# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 26.

EDWARD HODGSON, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF VERMONT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

FILED OCTOBER 8, 1894.

(15,700.)

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# (15,700.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1896.

No. 177.

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EDWARD HODGSON, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF VERMONT.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1896.

1 UNITED STATES OF AMERICA, *ss:*

EDWARD HODGSON, Plaintiff in Error,
*vs.*
STATE OF VERMONT

The President of the United States of America to the honorable the judges of the supreme court of the State of Vermont, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Vermont, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Vermont and Edward Hodgson, of Orwell, in the county of Addison and State of Vermont, in a prosecution by and in the name of said State of Vermont against said Edward Hodgson, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of
2 a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Edward Hodgson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this seventh day of May, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
*Clerk of the Circuit Court of the United States,*
*District of Vermont.*

Allowed by—
JONATHAN ROSS,
*Chief Judge of Supreme Court of Vermont.*

[Endorsed:] Edward Hodgson, plaintiff in error, *vs.* State of Vermont. Writ of error. Supreme Court of the United States. Hard & Bliss, Burlington, Vermont, attorneys for plaintiff in error. Filed June 7th, 1894. Rufus Wainwright, clerk of the supreme court of Vermont for the county of Addison.

3 STATE OF VERMONT, } *ss.*:
*Addison County,* }

I, Rufus Wainwright, clerk of the supreme court of the State of Vermont for the county of Addison, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to forty-two, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Edward Hodgson, plaintiff in error, against The State of Vermont, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at Middlebury, in the county of Addison, in the State of Vermont, this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Supreme Court, State of Vermont.]

RUFUS WAINWRIGHT,
*Clerk of the Supreme Court of Vermont for the County of Addison.*

3½ STATE OF VERMONT, } *ss.*:
*Addison County,* }

At a term of the supreme court held at Middlebury, within and for the county of Addison aforesaid, on the third Tuesday after the fourth Tuesday of January, A. D. 1893.

Present in court: James M. Tyler, Loveland Munson, Henry R. Start, Laforest H. Thompson, assistant judges; Rufus Wainright, clerk; K. W. Merritt, sheriff.

4 STATE OF VERMONT }
*vs.*
EDWARD HODGSON. }

Be it remembered that in the June term, A. D. 1892, of the county court within and for said county of Addison comes Frank L. Fish, State's attorney within and for said county of Addison, and brings into court now here his information against Edward Hodgson in words and figures following, viz:

5 *Information.*

STATE OF VERMONT, } ss:
*County of Addison,* }

Addison County Court, at Their June Term, Begun and Holden at Middlebury on the First Tuesday of June, A. D. 1892, within and for the County of Addison.

Be it remembered that Frank L. Fish, State's attorney within and for said county, comes here into open court, in his own proper person, and upon his oath of office gives said court to understand and be informed that Edward Hodgson of Orwell, in the county of Addison and State of Vermont, on the 7th day of June, A. D. 1892, at Orwell, in the county of Addison aforesaid, did at divers times sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the said State's attorney, on his oath aforesaid, comes and gives said court further to understand and be informed that the said Edward Hodgson, prior to this time, to wit, at the December term of the county court held at Middlebury in and for the county of Addison, on the first Tuesday of December, A. D. 1891, before and by consideration of said court, was, as appears of record, convicted of selling, furnishing and giving away intoxicating liquor against the law in such case made and provided.

FRANK L. FISH,
*State's Attorney.*

[Endorsed:] No. 8. State of Vermont *v.* Edward Hodgson. Supreme court, Addison county, February term, 1893. Respondent's exceptions and copy of information. W. H. Bliss, J. M. Slade, att'ys for respondent. No. 5. Tyler, J. 2.

6 And the said respondent, at said term of the county court, in the custody of the sheriff, by virtue of the warrant for his arrest duly issued from said county court, being brought to the bar here in his proper person, together with Robert W. Crammond, as surety, became recognized to the State of Vermont in the sum of five hundred dollars for the appearance of said respondent to answer said information.

And at said term said State's attorney filed specifications in words and figures following, viz:

7 *Specification.*

STATE }
*vs.*
EDWARD HODGSON. }

In said case the State's attorney, for a specification, specifies and says as follows: That he will rely upon and expect to prove in the

trial of said cause the fact that the respondent within three years before the filing of the information in the said cause, sold, furnished, and gave away intoxicating liquor to the following-named persons, or to some one or more of them, that is to say:

Frank Charlton, George Munger, Erwin Stedman, Fred. Ferdett, Patrick Sullivan, Joseph Fortiner, S. D. Wells, Alonzo Monger, John Carler, Frank Walker, Rollin Young, Dwight Walker, Sidney Reynolds, Charles Walker, M. Cobur, W. H. Walker, William Martin, Frank Stedman, Elec. Godett, James Percial, D. S. Babett, Benjamin French, J. R. Babett, Joseph Chamberlain, Frank Ross, Fred. Chamberlain, S. H. Conkey, Chas. Chamberlain, Chas. Ricard, A. K. Miller, John Reobins, John Conway, Anson Monger, Walter Buck, Thomas Clark, George Buck, Freeman Buck, C. Bissett, Thomas Percial, Robert Crammond, Timothy La Duke, Lewis La Duke, James Crammond, Thomas La Duke, William Gignore, Edward Beckwith, Fred. La Duke, George, Tatro, Fred. Rickard, Edward Godett, Quton Moffett, Edward Walker, William Percial, Levi Hopkins, R. A. Clark, T. Daniels, Frank Stevens, Chas. Chamberlain, Jr., Dan. Rogers, Thomas Dewett, Dennis Sullivan, John Sullivan, Jay Branch, Bert Bishop, John Root, Esaw Morris.

And the undersigned State's attorney states that he has also specified the offences against said respondent, with all the certainty as to the time and person, and he is now able from all the information he has in said cause; and the State's attorney reserves the right to amend these specifications if he shall have further evidence, pursuant to the statute.

And the State's attorney further specifies and relies upon the selling, furnishing and giving away of intoxicating liquor by the respondent within three years before the filing of said information to some person or persons now unknown to the State's attorney, and claims the right to add the names of such persons when ascertained to the specifications and to make such other amendments in these specifications as the law and the discretion of the court may admit.

FRANK L. FISH,
*State's Attorney.*

Middlebury, Vt., June 24, 1892.

[Endorsed:] Specifications. State *v.* Edward Hodgson. Addison county court, June term, 1892. Filed June 24, 1892. R. Wainwright, clerk.

8 And at said term of court said respondent filed the following motion to quash said information, viz:

"Addison County Court, June Term, 1892.

STATE OF VERMONT
*vs.*
EDWARD HODGSON.

And now comes the respondent in the above-entitled cause and moves the hon. court that the information in said cause may be

quashed, for the said State's attorney had no lawful authority to make and file such information in said cause.

By his attorney, WM. H. BLISS."

The court overruled said motion and the said respondent excepted.

9 Said respondent, being brought to the bar here in his proper person and being demanded concerning the premises in said information contained, said that he was not guilty thereof, and put himself upon the country for trial.

A jury being impaneled and sworn, upon trial of said cause on their oath said that the respondent was guilty of one offense as of first conviction and was guilty of one offense as of second conviction of the crime charged in said information.

And thereupon said respondent filed his bill of exceptions in words and figures following, viz:

10 Addison County Court, June Term, 1892.

STATE OF VERMONT }
*vs.*
EDWARD HODGSON. }

*Respondent's Exceptions.*

State's attorney's information for illegal sale, furnishing and giving away intoxicating liquor, alleging a prior conviction. Plea, not guilty, and trial by jury, Taft, J., presiding. Verdict, guilty of one first offence and one second offence.

Before pleading, the respondent presented and filed a written motion that the information be quashed for that the said State's attorney had no lawful authority to make and file such information in said cause. This motion was overruled by the court, to which ruling the respondent excepted.

On the trial the respondent was improved as a witness in his own behalf and his counsel offered to show by him that at the alleged former conviction at the December term, 1891, of this court, which conviction was had upon respondent's plea of guilty of six first offences, it was agreed between him and the State's attorney that if he would so plead guilty to six first offences, and would thenceforth desist from the illegal sale, furnishing or giving away of intoxicating liquor the State's attorney would not further prosecute him for any offence prior in time to that conviction. This evidence was excluded by the court, to which ruling the respondent excepted.

Exceptions allowed and placed upon the record. Judgment and sentence respited, mittimus stayed, and cause passed to the supreme court.

R. S. TAFT,
*Presiding Judge.*

11 And thereupon said bill of exceptions was allowed, judgment and sentence respited, mittimus stayed, and the cause was passed to the supreme court.

And said respondent and John Hall, as surety, became recognized to the State of Vermont in the sum of five hundred dollars for the appearance of said respondent to answer in said cause.

And at said term of the supreme court day was given and said cause continued to the general term of said supreme court then next to be held at Montpelier, in the county of Washington, on the — day of October, A. D. 1893.

At said October general term, A. D. 1893, the respondent filed a motion in arrest of judgment in words and figures following, viz:

12 STATE OF VERMONT:

Supreme Court, General Term, 1893.

STATE OF VERMONT }
*vs.*
EDWARD HODGSON. }

The said Edward Hodgson hereby amends his motion in arrest of judgment, heretofore filed in this court, so as to be and read as follows:

And now, after verdict and before judgment or sentence, comes the said Edward Hodgson and prays that judgment herein may be arrested, and for cause says as follows:

1. The information in this cause is insufficient and void because it is vague, indefinite, multifarious, defective and lacking in substance in the following particulars, viz:

It charges the respondent with a multitude of infamous crimes of three distinct kinds, in a single count, under a defective allegation of only one of each kind.

It charges the respondent in a single count with an indefinite number of infamous crimes of three distinct classes, to wit, selling, furnishing and giving away intoxicating liquor, at divers times, and omits and fails to state, in respect to any one of such alleged crimes, the following matters of substance, namely:

The quantity of intoxicating liquor so alleged to have been sold.

The kind of intoxicating liquor so alleged to have been sold.

The place, in the town of Orwell, where such alleged sales of liquor were made.

The time when such alleged sales of liquor were made.

To what person or persons such alleged sales of liquor were made.

Who owned the liquor so alleged to have been sold.

Who paid for the liquor so alleged to have been sold.

For what consideration, or considerations, such alleged sales of liquor were made.

13 In what capacity the respondent made such alleged sales of liquor—whether as principal, or as clerk, servant or agent of another.

And the same matters in respect to the alleged furnishing and giving away of intoxicating liquor, except those that pertain to the consideration.

2. In this cause, as appears by the record, the said Edward Hodgson, upon his trial, was deprived of his right to be informed of the nature and cause of the accusation against him.

3. Said Edward Hodgson, on his said trial, was also denied, as appears by the record, of his right to a trial by jury according to the course and principles of the common law.

4. Said Edward Hodgson, on said trial, as appears by the record, was convicted of two infamous crimes without due process of law.

5. Said Edward Hodgson, on said trial, was denied by the State the equal protection of the laws.

6. The statutes under which the information in this cause is drawn, being sections 3859 and 3860 of the Revised Laws of Vermont, are unconstitutional and void for the following reasons:

They are repugnant to that part of article 9 of chapter 1 of the constitution of Vermont, which declares: "That every member of society hath a right to be protected in the enjoyment of life, liberty and property."

Also to those parts of article 10 of the same chapter which declares: "That in all prosecutions for criminal offences a person has a right * * * to demand the nature and cause of his accusation; to call for * * * a speedy and public trial by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can any person be justly deprived of his liberty, except by the laws of the land or the judgment of his peers."

Also to article 12 of said chapter, which provides: "That when any issue of fact proper for the cognizance of a jury is joined, the parties have a right to a trial by jury which ought to be held sacred."

Also to section 6 of chapter 2 of said constitution, which ordains that: "The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."

Also to that part of section 9 of chapter 2 of said constitution, which provides that the General Assembly "shall have no power to add to, alter, abolish or infringe any part of this constitution."

13½ 7. Act No. 42, of the Acts of the General Assembly of Vermont of 1888, is repugnant to that part of section 32, of chapter 2, of said constitution, which provides that "all fines shall be proportioned to the offences."

8. Said act No. 42, of the Acts of the General Assembly of Vermont of 1888, is repugnant to that part of article 8 of the amendments to the Constitution of the United States, which provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

9. Said sections 3859 and 3860, of the Revised Laws of Vermont, are repugnant to that part of article 6 to the amendments to the Constitution of the United States, which provides that: "In all

criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation."

Also to that part of article 5 of said amendments, which provides: "That no person shall be deprived of life, liberty or property without due process of law."

Also to article 8 of said amendments, which provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Also to that part of article 14 of said amendments which provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the laws."

EDWARD HODGSON,
By his attorney, WM. H. BLISS.

[Endorsed:] Respondent's amended motion in arrest of judgment. State of Vermont *v.* Edward Hodgson. Supreme court, general term, 1893. W. H. Bliss, respondent's attorney.

14 Said respondent being in said supreme court and said cause having been heard, day was given, and at the January general term of said supreme court, A. D. 1894, it was considered and adjudged that the respondent take nothing by his exceptions, and that his motion in arrest of judgment is overruled.

Jonathan Ross, chief judge, read the following opinion, viz:

15 Supreme Court, General Term, 1893.

STATE
*vs.*
EDWARD HODGSON.

The opinion of the court was delivered by Ross, *C. J.:*

The motion to quash was properly denied. Whether addressed to the discretion of the court and not revisable in this court or otherwise, the ground of the motion was that the State's attorney had no authority to proceed by information. That ground is not insisted upon now. While held to be addressed to the discretion of the trial court and not revisable in this court because it cannot be pleaded as a matter of right, in State *vs.* Stewart, 59 Vt., 273; in State *vs.* Keyes, 8 Vt., 57; State *vs.* Davies, 52 Vt., 376, and State *vs.* Meader, 62 Vt., 458, in which whether the entertainment of such motions is discretionary with the trial court was not raised nor considered, the denial of such motions by the trial court was considered and passed upon in this court. In the case last named the judgment of the trial court on such a motion was reversed and the complaint was adjudged insufficient and quashed. But if the question presented by such motion can be entertained in this court it can be enter-

tained only upon the ground raised by the motion and passed upon by the trial court. Error in the action of the trial court must distinctly appear. The party cannot be allowed to urge one ground for sustaining a motion in that court and then in this court set up a new ground for sustaining it—a ground not considered nor passed upon by the trial court. The respondent's counsel contends that by using in the motion the words "such information" he thereby raised the question of the sufficiency of the information. But that is not the ordinary and natural construction to be placed upon the language of the motion. If he really intended to raise the question of the insufficiency of the information we should have expected he would have pointed out wherein he claimed it was insufficient. He should have done so to have raised that question. It is not for the trial court to hunt for some concealed rather than clearly defined reason for entertaining the motion. For this court to revise the action of the trial court on such motion, as we think it might if it was shown that the trial court entertained it and passed upon its sufficiency as a matter of law, the grounds for the motion as well as the action of the trial court should be clearly and fully set
16 forth. Otherwise this court will assume that the trial court denied the motion as a matter of discretion.

II. The county court properly excluded the offered testimony of the respondent with reference to his agreement with the State's attorney in regard to what offences should be covered or merged in his former conviction. The statute is specific, R. L., 3505, that "unless the respondent, at the time of pleading guilty, specifies some other days on which such offences were committed, in which case an entry thereof shall be made upon such complaint, indictment, or information, and become a part of the record," the offences to which he pleads "shall be held to have been committed on the days specially set forth in such complaint, indictment, or information." The offered testimony would contradict the record of the former conviction. This is not allowable. State *vs.* Haynes, 35 Vt., 565. The record imports verity of the facts stated. If the information as drawn did not truly describe the offences to which he desired to plead guilty the statute gave him an opportunity to have it amended so that it would. The exceptions are not sustained, and the respondent takes nothing thereby. The county court respited judgment and sentence. The case stands now for judgment and sentence in this court. R. L., 1700.

III. But the respondent has filed in this court an elaborate motion in arrest of judgment. While such motions are usually allowed to be filed any time before final judgment, as they present the question whether upon the record legal judgment and sentence can be passed, yet, under our system of passing criminal causes from the trial court to this court, it is apparent that it was contemplated that this court should sit only as a court of error in such cases. R. L., 1699, the only statute on the subject, reads: "Questions of law decided by the county court, arising upon demurrer or trial by jury, or upon motion in arrest, in a prosecution by indictment or information for a crime or misdemeanor, shall, after verdict of guilty is

returned, upon motion of the respondent, be allowed and placed upon the record, and the same shall thereupon pass to the supreme court for final decision." Then R. L., 1700, is: "If upon the inspection of the record in a cause where judgment, sentence, and execution have been respited and stayed, the supreme court is of the opinion that judgment ought to be rendered upon the verdict, it shall render judgment and sentence thereon, and cause execution thereof to be done." From these provisions of the statute we think that a motion in arrest of judgment and sentence cannot properly be filed in this court; that such motion should be filed in and be passed upon by the trial court, and come to this court as matters of error. We might properly dispose of this motion on this ground. * * *

17 But the character of the motion is so far-reaching that this court would, on proper application, remand the cause to the trial court to allow the respondent to file his motion and have it passed upon there. Such being the case, and inasmuch as the questions arising on the motion have been fully argued and considered, we have concluded to pass upon the sufficiency of the motion, as though it had come regularly before this court. Such motions are somewhat limited in their operation. They do not always reach all defects which would be reached by a general demurrer. They are confined to the record. A general demurrer reaches every material defect in substance. After verdict every reasonable intendment is made in support of the verdict, if there is nothing on the record to prevent it. 1 Chitty, Pl., 673, note 1. It is said there: "The general principle upon which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict—that is, the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleading was proved at the trial, and such intendment must arise not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given." But where no ground of complaint or action is set out, the complaint, indictment, information, or declaration will not be aided by verdict. This subject has been frequently before this court, and has been fully elaborated, elucidated, and approved. Harding *vs.* Cragie, 8 Vt., 501; Morey *vs.* Harmon, 10 Vt., 565; Manwell *vs.* Manwell, 14 Vt., 14; Needham *vs.* McAuley, 13 Vt., 68; Clossom *vs.* Staples, 42 Vt., 226, and recently State *vs.* Freeman, 63 Vt., 496; Noyes, French and Fickett *vs.* Parker, 64 Vt., 379.

Keeping these limitations of the scope of the motion in arrest in mind, we will consider the elaborate objections and contentions of the respondent's counsel. We quite agree with his con-

tention that, with respect to the substantial allegations to be contained in the pleadings, this class of crimes is no exception to those required in charging the highest crimes. As said by this court in State *vs.* Davis, 52 Vt., 376: "This class of cases is no exception to the generality of criminal cases;" and in State *vs.* Haley, 52 Vt., 476: * * * "This class of statutory crimes stands for the same consideration and is subject to the same rules of law as any other crime." Under this rule
18 we need not consider whether the crimes charged and of which the respondent was found guilty are infamous under the laws, and the decision of the United States Supreme Court cited by the respondent. That court and all other courts of final resort, so far as we are aware, have classed offences against the various laws of the State regulating or prohibiting, unless in excepted cases for specified purposes, the sale of intoxicating liquors as misdemeanors within the police power of the various States to regulate, restrain, and punish, as the statutes of the several States might provide, unless such statutes invaded some constitutional right secured to the accused. While it is difficult to define and limit in exact terms the police power of the State, it is generally held to extend to all regulations affecting the health, good order, morals, peace, and safety of society—Butler *vs.* Chambers (36 Min., 69) and note 1 Am. St. R., 141; Thorpe *vs.* R. & B. R. R. Co. (27 Vt., 140), 62 Am. Dec. (and note), 625; Slaughter-house cases, 16 Wal., 62; Mugler *vs.* Kansas (123 U. S.), 31 L. C., 205; People *vs.* Wagner (86 Mich., 594), 24 Am. St. R., 141—and to include the right to regulate and control the manufacture and sale of intoxicating liquors. Article 5th of the bill of rights of this State expressly reserves to the legislature the right to regulate this power. It reads: "That the people of this State by their legal representatives have the sole, inherent, and exclusive right of governing and regulating the internal police of the same." But in exercising this right the legislature cannot deprive a citizen of an essential right secured by the bill of rights or Constitution, such as depriving him of the right to be tried by a common-law jury. State *vs.* Peterson, 41 Vt., 504. It is further contended that the law under consideration cannot be a police regulation because it requires the court on conviction for a second offence to imprison the convict not less than a month and not more than a year. The statute of Kansas under consideration in Mugler *vs.* Kansas, *supra*, gave the court power to fine or imprison on either the first, second, or subsequent conviction, limiting the time on the first conviction from twenty to ninety days, on the second conviction from sixty days to six months, and on every subsequent conviction from three months to one year. * * * The fines that could be imposed varied from $100 to $1,000. Yet this was held by the Supreme Court of the United States to be a police regulation. Formerly under this law in this State the imprisonment was in the county jail. When only a fine was imposed the convict was committed to the county jail to remain until the fine was paid. In the course of time the house of correction was established to take the place of the county jails as a place of imprisonment, both as

being better equipped for the confinement of the prisoner
19 humanely and as affording him an opportunity to work out his fine. This is within the letter and spirit of chapter 2, sec. 37, of the constitution. If his offences are numerous so that his fine is large, still his imprisonment may be avoided by payment, and, if he does not pay it, the term of imprisonment is limited, whereas, under imprisonment in the county jail, there was no discharge except by payment; hence whether the imprisonment is in the house of correction or in the county jail does not affect the law as a police regulation. The statute complained of provides, R. L., 3802, "If a person by himself, clerk, servant, or agent sells, furnishes, or gives away, or owns, keeps, or possesses with intent to sell, furnish, or give away intoxicating liquor or cider in violation of law he shall forfeit for each offence to the State upon the first conviction not less than five nor more than one hundred dollars, and may also be imprisoned, in the discretion of the court, not more than thirty days; upon the second and each subsequent conviction not less than ten nor more than two hundred dollars for each offence, and shall also be imprisoned not less than one month nor more than one year." R. L., 3803, provides that prosecutions may be had before the county court or a justice of the peace on complaint of the grand juror or information of the State's attorney. R. L., 3859, prescribes the form of a complaint or information, the essential part of which is "that —— ——, of ——, on the — day of ——, A. D. —, at ——, did, at divers times, sell, furnish, or give away (as the case may be) intoxicating liquor without authority, contrary to the form of the statute," &c. R. L., 3860: "Under the foregoing complaint every distinct act of selling, furnishing, or giving away may be proved and the court shall impose a fine for each offence." When this form of complaint or information was first prescribed, some prosecuting officers drew the information with a hundred or more counts for selling, as many for furnishing, and as many for giving away. This only enhanced the costs, and the court held that it was unnecessary; that the separate counts furnished the respondent no additional information, except the days on which the offences were charged were named, but held that under this complaint the respondent was entitled to a specification or bill of particulars setting forth, as well as the prosecuting officer was able, the claimed offences for which he should ask a conviction on the trial.

State *vs.* Conlin, 27 Vt., 323.
State *vs.* Bacon, 41 Vt., 532.
State *vs.* Davis, 52 Vt., 376.
State *vs.* Freeman, 27 Vt., 525.
State *vs.* Rowe, 43 Vt., 267.
State *vs.* Wooley, 59 Vt., 357.

In 1858 the legislature provided that but one court should be required or allowed for in the taxation of costs. The court also held that the State must be confined on the trial to the offences specified—State *vs.* Rowe, *supra*—but that the court had the power

when it would work no disadvantage to the respondent to allow the specifications to be amended.

20 Under these conditions the trials of these causes have gone on for nearly forty years without special complaint, inconvenience, or hardship, certainly none which has successfully appealed to the legislature for modification. In administering the law this court held that every traversable fact must be alleged, with time and place, and without such allegation the information was bad. State *vs.* Kennedy, 36 Vt., 563; State *vs.* O'Keefe, 41 Vt., 691. It was also held that if the words "at divers times" were omitted but one offence could be shown. State *vs.* Jones, 39 Vt., 370. Also that the court prescribed was not bad for duplicity. State *vs.* Bacon, 36 Vt., 560. It is now contended that these decisions are erroneous that the prescribed form is in the disjunctive and authorizes the charging of but one class of offences, either a sale, a furnishing, or a giving away. This contention assumes that a sale of intoxicating liquors under the statute is a different offence from furnishing it or giving it away, but this is not true. The thing prohibited consists in providing intoxicating liquor contrary to law. It may be done in any of the three ways specified. A sale, a furnishing, a giving away of intoxicating liquor, each is the prohibited provision of it aimed to be suppressed by the stutute. The quality and magnitude of the offence is the same, the penalty and mode of enforcement the same, in whichever of the three ways it is committed.

The form of the prescribed complaint that the accused "did sell, furnish, or give away," &c., indicates that with the words "at divers times" omitted but one offence against the statute, committed in one of the ways specified, disjunctively, was intended to be charged, as held in State *vs.* Jones, *supra;* but every transaction violating this law comes within one of these terms. The prosecutor is confined to a single count. He must frame it to meet the varying phases of his proof. Without the words "at divers times" it charges but one offence, whether the complaint charges the sale, furnishing, and giving away conjunctively or disjunctively; if a sale is shown, the other words are surplusage, and *vice versa.* With the words "at divers times" added it gives notice that more than one or many offences may be claimed to be shown at the time and place specified. It is not unlike the common count in assumpsit for goods sold and delivered; single, but many different sales may be shown under it; but if double, duplicity is not reached by a motion in arrest of judgment. The respondent availed himself of his right to specifications, and they were furnished. The offences, whether by a sale, furnishing, or giving away, are of the same degree, and whether for first or second conviction require the same or a similar plea, the same or a similar verdict, and are similarly punished. The fact that they are included in one count does not invade any constitutional or other right more than if they were in separate counts. "In criminal proceedings the joinder of different offences of the same degree

21 in an indictment does not render the proceedings defective, though it is a matter of discretion in the court on

motion to quash an indictment so framed." 1 Chitty Pl., 201; The King *vs.* Kingston, 8 East., 41; Young *et al. vs.* The King, 3 D. and E., 98. The last case, an indictment for obtaining goods under false pretenses, against the statute, where the sentence was transportation for seven years, was held to be a misdemeanor, and that the indictment need not meet the requirements of the common law, provided it met those of the statute. The constitution of the State, its provision for a legislature to enact laws, the committal to it of the exclusive right and power to govern and regulate the internal police of the State, as well as the statutes of the State, proceed upon the theory that it has the right and power to change and vary at its pleasure both in criminal and civil matters the methods of procedure so long as it does not invade the fundamental right of the citizen reserved by the constitution. It does not, as some seem to think, tie up the legislature to follow common-law methods of procedure even in criminal cases, but it may be helpful to ascertain what the common law required. It has no different rule as to the definiteness of pleadings in criminal than in civil matters. Says Mr. Chitty, 1 Chitty Pl., 213: "The observations of Lord Chief Justice De Grey on the structure of an indictment are very forcible and equally applicable to the pleadings in civil actions: 'The charge must contain such a description of the injury or crime that the defendant may know what injury or crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the court may see such a definite injury or crime that they may apply the remedy or the punishment which the law prescribes. The certainty essential to the charge consists of two parts, the matter to be charged and the manner of charging it.' This extract is taken from the learned judge's opinion, delivered in the House of Lords, in Rex. *vs.* Horne, Cowper, 672. It is a celebrated case, which grew out of our revolution, was carefully tried and thoroughly considered both in the trial court by Lord Mansfield and in the House of Lords. The learned judge further says: 'As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage." * * * "Secondly, as to the manner of making the averment, there are cases where a direct and positive averment is necessary to be made in specific terms, as where the law has affixed and appropriated technical terms to describe a crime, as in murder, burglary, and others. It is likewise true that in all cases those facts which are descriptive of the crime must be introduced upon the record by averments in opposition to argument and inference.'"

Applying these clearly expressed rules to the case at bar, the offence created by the statute is the provision of intoxicating liquors
22 without the authority of law, either by sale, furnishing, or giving away. There are no circumstances necessary to be set out to constitute either of these facts an offence. The terms of the statute as clearly import the prohibited offence as any terms can. The offence is neither heightened nor lessened by nor dependent upon

the kind or amount of intoxicating liquors sold, nor upon the person to whom the sale, furnishing, or giving away is made, nor upon the amount of money received, nor upon whether made by the respondent or by some one for him. None of these particulars need be set forth to notify the respondent of the offence with which he is charged and called upon to answer, nor to apprise the jury of what they are to convict or acquit him, nor to apprise the court of the sentence which it should impose. The prescribed form covers the offence in the exact and easily understood language of the statute which creates it. This is sufficient. State *vs.* Daley, 41 Vt., 654; State *vs.* Cook, 38 Vt., 437; State *vs.* Jones, 33 Vt., 443; State *vs.* Matthews, 42 Vt., 542; State *vs.* Clark, 44 Vt., 636; State *vs.* Benjamin, 49 Vt., 101; State *vs.* Higgins, 53 Vt., 198; State *vs.* Miller, 60 Vt., 90; State *vs.* Campbell, and note 94, Am. Dec., 251. In Bishop's Cr. Pro., 614, the author says: "The allegations must cover so many of the statutory terms as will show a *prima facie* violation of the written laws and need cover no more." It is not an ancient crime which has been from time immemorial clothed in special terms which by long use have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common-law crime without defining it or creates an offence and prescribe no form for an information. In such cases it is well held that the common-law requirements in charging it must be met. By statute enacted in 1787 and continued since that time, R. L., 689, the common law when applicable to the local situation and circumstances and not repugnant to the constitution or laws has been the law in this State, but not otherwise; but by this statute the common law is not in force in charging a statutory crime created in clear, definite terms with a prescribed form for charging it in the terms of the statute. It is sufficient in such a case to follow the prescribed form. The respondent contends that the prescribed form is defective, in that it does not require the names of the persons to whom sales are claimed to have been made to be set forth; that sales must be made to some peason; but this contention is based on the requirements of the common law when applicable. The specification ordinarily would, and did in this case, supply the information. Some courts have maintained this contention in regard to the statutes which they had under consideration. Whether the operation of the common law was limited in those States as it is in this does not appear; but the decision of courts of final resort are nearly evenly divided on this subject. This court has held that the names of the persons need not be set forth. State *vs.* Munger,
23 15 Vt., 290; Bishop on Cr. Pro., § 1037 and note. The author there says: "On both sides they seem supported by a considerable weight of reasoning." * * * "Undoubtedly identification may be made sufficiently clear to satisfy the demands of legal principle without the name." Without doubt the difference in the decisions is controlled to some degree at least by the difference in the language of the statutes creating the offence. It is also contended that the particulars of the kind of liquors, price, and name of the person to whom sold should be set forth in the infor-

mation both to apprise the respondent of the evidence he has to meet and to have the record protect him from a second conviction for the same offence. It is never necessary for the State to disclose what is merely its proof of the commission of the offence charged in the information. If the record does not itself identify the offence or offences for which conviction has been had on the trial of a subsequent prosecution, such identification may be made by parole testimony. If these particulars were set out in the information, resort might have to be had to parole proof to identify the offence for which conviction was had. It might occur that the same respondent made more than one sale of the same kind and quantity of liquor to the same person, at the same price, at the same place, and on the same day. By the common law it has always been held that the prosecutor need not set forth the name of the person when unknown. It is sufficient to state that his name is unknown. These particulars of the kind, quantity, price, and person to whom sold are seldom known to the prosecutor until revealed by the witness upon the stand. Without these particulars the prescribed form answers every essential requirement of the common law in regard to informations or indictments. The prescribed form sets forth in clear language, easily to be understood, "the cause and nature of the accusation." It meets fully the 10th article of the bill of rights in this respect. By the use of the words "at divers times" on the day named it notifies him that he may be called upon to meet more than one offence committed in one of the ways named. The prosecution is never confined to prove the offence on the day specified in the information if the proof is within the time limited for the prosecution of the offence. The accused can of right call upon the prosecutor to specify more fully what is claimed to be included under these general terms. This is analogous to the common counts in assumpsit, in civil cases, which grew up under the common law. The defendant in a civil case is entitled to notice of what he is called upon to meet as much as a respondent in a criminal case and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and for this reason, that the defendant was entitled, as a matter of right, to a bill of particulars or specifications, and that such specifications supplied
24 what was lacking by the generality of the count in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate. In this view the information, aided by specifications, is good by the rules of the common law; but, whether it be or not, the legislature has an undoubted right to change and mould the forms of procedure so long as it does not deprive the accused of any constitutional right. It has not done so in the case at bar. Further, on a motion in arrest of judgment, the information and verdict which constitute the record, aided by the presumptive intendments, are ample to uphold a judgment and sentence. The respondent's counsel further contends that the legislature, in other parts of this law not brought under consideration by his motion, by enacting that this

class of cases shall stand for trial the first term, that a continuance shall not be allowed without cause shown, and that a *nolle prosequi* or discontinuance shall not be entered without cause and only with the consent of the court, has invaded the province of the court, so that the respondent under them does not have a common-law jury trial, and for that reason the whole law is unconstitutional. We do not understand that any of these provisions trench upon the province of the court. The legislature is to establish courts and define their jurisdiction and powers in accordance with the constitution. All cases, unless under some rule of court which the legislature has, either expressly or impliedly, authorized the court to make, stand for trial the first term of court and cannot be continued or discontinued without the permission of the court. No absolute nor discretionary power of the court is taken away by these provisions. This class of cases is not exceptional in its manner of trial. They are proceeded with like all other cases. The selection and empanneling of the jury, the rules of evidence, burden of proof, and procedure in the trial is the same as in all other criminal cases. What has been said in regard to the scope of the information, aided by specifications to which the respondent was entitled as a matter of right and which were furnished to him, and in regard to the order and manner of his trial makes the respondent's trial a trial by "due process of law" or "in accordance with the law of the land" within the varying definitions of these general terms as claimed by the respondent's counsel. He was notified in clear and unmistakable language of the offence with which he was charged. He heard the evidence by which it was sought to be established, was given ample opportunity to meet it by counter-evidence, and was given an impartial jury to determine whether the charges were established beyond a reasonable doubt. All of the many contentions, objections, and criticisms of the respondent upon this point concentrate, first, upon whether the information, aided by the specifications, sufficiently informed him of the "cause and nature of his accusation," and, secondly, whether, in enacting the law, the legislature invaded and took from the trial court some of its essential constitutional p-erogatives, both of which have been considered. We need not stop to apply what has been said to each contention in detail.

IV. He further contends that the statute is unconstitutional because it authorizes the requirement of excessive bail, the imposition of fines excessive and disproportionate to the offence alleged, and the infliction of cruel and unusual punishment. The only punishment authorized is fines and imprisonment in the house of correction. The largest time of imprisonment proper for a second conviction is one year, and for failure to pay the fine imposed, however large and for howsoever many offences, could not exceed three years. No. 78, Acts of 1892. This State has no constitutional provision rendering a punishment by fine and imprisonment at hard labor unusual and cruel. Sec. 37, chapter II, of the constitution of the State is: "To deter more effectually from the commission of crimes by continual visible punishments of long duration and to make sanguinary

punishments less necessary, mean sought to be provided for punishing by hard labor those who shall be convicted of crimes not capital, whereby the criminal shall be employed for the benefit of the public or for the reparation of injuries done to private persons," and this is its only provision in relation to such punishments. The statutory provisions in regard to the punishment of this class of offences is in line with the State constitution. It is claimed that the 8th amendment of the Constitution of the United States is applicable, and that the punishment is cruel and unusual under that. That article has been so far held to be applicable only to punishments under the laws of the United States. Barron *vs.* Baltimore, 7 Pet., 243; Pervear *vs.* Massachusetts, 5 Wall., 475; O'Neil *vs.* State of Vermont, 144 U. S., 323. In the case last named Justice Blatchford, in the opinion of the court, says: "Moreover, as a Federal question, it has always been ruled that the 8th amendment to the Constitution does not apply to States." Justice Field, in a dissenting opinion, holds that the 14th amendment has made the 8th amendment applicable to the States, but such is not the holding of the court in that case. In this case the longest term of imprisonment proper could not exceed one year and the greatest fine could not exceed three hundred dollars, and on failure to pay the fine the imprisonment could not exceed three years. In the O'Neil case the imprisonment proper was one month, but the number of offences was so great that the fine amounted to a large sum, and if unpaid the imprisonment would be over fifty-four years for him to work out the fine in the house of correction. It was only the aggregation of imprisonment that Justice Field complained of as cruel and unusual. *Non constat* that he would regard the extreme limit of punishment in this case as cruel and unusual. Considering
26 the magnitude of the evil sought to be restrained, the fact that the only motive for committing the offence is cupidity or desire of pecuniary gain to be acquired by taking advantage of the weakness of fellow-citizens weighed down if not overborne by pernicious habit, we do not think the punishment cruel or unusual. The punishment is graded and made to depend upon whether the conviction is the first or second. It is of such a nature as tends to take away the inducement to the crime. It is not unreasonable in the length of imprisonment nor amount of fine that can be imposed for a single offence.

V. It is further contended that the statutes under consideration are *are* repugnant to this clause in the 14th amendment to the Constitution of the United States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws." This in terms applies to the States. No claim is made nor can be made that these statutes apply to one class of citizens of this State or of the United States more than to all. Whoever of whatever class commits the prohibited acts within the State is an offender, subject to prescribed penalties. We have already considered whether any person was or

could be "deprived of life, liberty, or property without due process of law." What is due process of law is considered at length, and the common law and State decisions and the prior decisions of the United States Supreme Court brought together and reviewed in Hurtado *vs.* California, 110 U. S., 499. The result there reached is summarized by the court in its opinion in Leeper *vs.* Texas, 139 U. S., 462, as follows: "That by the fourteenth amendment the powers of States in dealing with crimes within their borders are not limited except that no State can deprive a particular person or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of Government unrestrained by the established principles of private right and distributive justice." To like import is Fong Yue Ting *vs.* United States, 149 U. S., 698. In this case it was held that Congress might change the burden of proof and prescribe the testimony required to remove it. The respondent concedes, as in reason he must, that the privileges and immunities of citizens of the United States which the States are prohibited from making or enforcing any law to abridge are
27 the two classes which have already been considered.

Judgment that respondent takes nothing by his exceptions, and that his motion in arrest of judgment is overruled.

I hereby certify that the foregoing 13 pages is a correct copy of the original opinion in the case State *vs.* Hodgson, read March 1, 1894, at the January general term of the supreme court.

March 20, 1894.

JONATHAN ROSS,
*Judge of Supreme Court.*

28 Whereupon the respondent was sentenced to be confined to hard labor in the house of correction, at Rutland, in the county of Rutland, for the term of 60 days, and to pay to the treasurer of the State of Vermont a fine of $30.00 for the first offense and a fine of $70.00 for the second offense, aggregating $100.00, and to pay the costs of prosecution, taxed at the sum of $197.36, with alternative sentence, as the law directs.

Upon suggestion by the respondent that he desire to pray out a writ of error to the United States Supreme Court, mittimus was stayed until the — day of May, 1894.

Whereupon, upon the 24th day of May, A. D. 1894, being a day in the May general term, A. D. 1894, of said supreme court, the respondent filed his petition for a writ of error to the United States Supreme Court and his assignment of errors in words and figures following, viz:

29 EDWARD HODGSON, Plaintiff in Error,
*vs.*
THE STATE OF VERMONT.

To the honorable the Supreme Court of the United States or to the supreme court of the State of Vermont:

The petition of Edward Hodgson, of Orwell, in the county of Addison and State of Vermont, respectfully shows to this honorable court as follows:

I.

Your petitioner, at and during the term of the county court of the State of Vermont begun and holden at Middlebury, within and for said county of Addison, on the first Tuesday of June, A. D. 1892, was residing in Orwell, in said county of Addison, and then was and ever since has been and still is a citizen of the United States; that at said term an information was filed in said county court against your petitioner signed by Frank L. Fish, State's attorney in and for said county of Addison, which said information was in the words and figures following, viz:

(Information as above stated.)

30 II.

That a warrant issued at said term out of and by authority of said county court against your petitioner, upon which said warrant your petitioner was apprehended and brought before said county court and there held to answer to said information.

That your petitioner afterwards and before trial applied for specifications of the several crimes or offences in said information charged against him or pretended so to be, and a certain written paper purporting to be such specifications or specification was, before trial, furnished him by said State's attorney; which said paper was in the words and figures following, viz:

(Specifications as above stated.)

31 III.

That the further proceedings in said county court are set forth in a certain bill of exceptions after trial and at the same term allowed by Hon. Russell S. Taft, presiding judge of said county court; which said bill of exceptions was in the words and figures following, viz:

(Exceptions as above stated.)

32 IV.

That pursuant to the order in said bill of exceptions contained said cause passed to the supreme court of the State of Vermont and became and was in order for trial at the term of said supreme court begun and holden at said Middlebury, within and for said county of Addison, on the — day of February, A. D. 1893, at which said February term said cause, by order of said supreme court, was con-

tinued to the general term of said supreme court, to be holden at Montpelier, in the county of Washington and State of Vermont, on the — day of October, A. D. 1893; that at said last-named term, and before hearing in said cause, your petitioner filed in said supreme court his motion in arrest of judgment; which said motion was in the words and figures following, viz:

(Motion in arrest as above stated.)

33 V.

That thereafterwards, at the same term, said cause came on to be heard by and before said supreme court of the State of Vermont and was argued by counsel; and thereafterwards, to wit, at the next general term of said supreme court of the State of Vermont, to wit, at said Montpelier, on the first day of March, A. D. 1894, the said case was decided by said supreme court against your petitioner, the opinion of the court deciding said case being delivered by Hon. Jonathan Ross, chief judge of the supreme court of the State of Vermont; which said opinion was in the words and figures following—that is to say:

(Opinion of Ross, C. J., as above stated.)

34 VI.

That thereafterwards, on the second day of March, A. D. 1894, at said Montpelier, your petitioner was sentenced by said supreme court of the State of Vermont in said case to pay a fine and to be imprisoned at hard labor to the amounts and for the times in said sentence set forth; a certified copy of which said sentence is hereto annexed in the words and figures following—that is to say:

(Sentence as above stated.)

And that the alternative sentence in said sentence mentioned is under section 4366 of the Revised Laws of Vermont, and is a further or alternative sentence if the sentence in respect to payment of fine and costs be not complied with within twenty-four hours the respondent, your petitioner, shall be imprisoned at hard labor in said house of correction for as many days as thrice the number of dollars to be paid by the original sentence, including the costs of commitment.

35 VII.

And your petitioner avers that in the decision of said cause and in the said judgment and sentence therein against your petitioner by said supreme court of the State of Vermont the validity of the following-recited statutes of said State of Vermont was drawn in question by your petitioner, on the ground of their being repugnant to the Constitution of the United States, and the said decision was in favor of their validity; which said statutes are—

Sections 3802, 3803, 3859, and 3860 of the Revised Laws of Vermont and No. 42 of the acts of 1888.

36 VIII.

And your petitioner further avers that there was manifest error in said proceedings and in said decision, judgment, and sentence of said supreme court of the State of Vermont in favor of said State of Vermont and against your petitioner that is revisable and ought to be revised and corrected by this honorable court, and your petitioner avers that said supreme court of the State of Vermont erred in the following decisions and proceedings, and he hereby assigns the same for error in this cause—that is to say:

1. In deciding and because said court decided that said sections 3802 and 3803 of the Revised Laws of Vermont, as amended by No. 42 of the acts of the legislature of Vermont of the year 1888, section 3859 and the first part of section 3860 of said Revised Laws above recited, are not, nor are any of them or any part thereof, repugnant to the Constitution of the United States.

2. In deciding and because said court decided that said section 3802 of the Revised Laws of Vermont, as amended by said act No. 42 of the acts of 1888 of the legislature of Vermont and above recited, is not repugnant to that part of article 8 of the amendments to the Constitution of the United States which provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. In deciding and because said court decided that said sections 3859 and 3860 of the Revised Laws of Vermont are not repugnant to that part of article 6 of the amendments to the Constitution of the United States which provides that: "In all criminal prosecutions the accused shall enjoy the right to be inform- of the nature and cause of the accusation."

4. In deciding and because said court decided that said sections 3859 and 3860 of the Revised Laws of Vermont are not repugnant to that part of article 5 of said amendments to the Constitution of the United States which provides: "That no person shall be deprived of life, liberty, or property without due process of law."

37 5. In deciding and because said court decided that said sections 3859 and 3860 of the Revised Laws of Vermont are not repugnant to that part of article 14 of the amendments to the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws."

6. In deciding and because said court decided that in being forced to trial upon the above-recited information and so-called specifications, and convicted and sentenced thereon, pursuant to said statutes, no privilege or immunity of your petitioner was abridged.

7. In deciding and because said court decided that said State of Vermont in forcing your petitioner to trial on said information and so-called specifications, and procuring his said conviction and sentence thereon, did not deprive your petitioner of his liberty and property without due course of law.

8. Because in the passing of the aforesaid sentence upon your petitioner an excessive fine was imposed and a cruel and unusual punishment inflicted upon your petitioner by said court.

Wherefore your petitioner prays this honorable court to grant unto him a writ of error, to be issued out of this honorable court, and to be directed to the judges of said supreme court of the State of Vermont, commanding them that they send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the errors aforesaid what of right and according to the laws and customs of the United States should be done.

EDWARD HODGSON,
By his attorney, WM. H. BLISS.

STATE OF VERMONT, *Chittenden County*, } ss:

I, William H. Bliss, of Burlington, in said county of Chittenden, on oath say that I have carefull- read the foregoing petition for writ of error, and that the matters of fact therein stated are true.

WM. H. BLISS.

Subscribed and sworn to, at Burlington, this — day of April, A. D. 1894, before me—

E. R. HARD,
*Master in Chancery.*

38 And afterwards, on said 24th day of May, A. D. 1894, in accordance with the petition of said respondent, a writ of error to the United States Supreme Court was duly allowed by Jonathan Ross, chief judge of the supreme court of the State of Vermont, ordered to be filed, and was filed June 7, A. D. 1894.

And upon said 24th day of May, A. D. 1894, the respondent filed a bond in error, duly approved by said Chief Judge Jonathan Ross, on the 23d day of May, A. D. 1894, in words and figures following, viz:

"Know all men by these presents that we, Edward Hodgson, of Orwell, in the State of Vermont, as principal, and W. H. Bliss and E. R. Hard, of Burlington, in said State, as sureties, are held and firmly bound unto the State of Vermont in the full and just sum of five hundred dollars, to be paid to the said State of Vermont, its treasurer or its certain attorney or assigns; to which pay-
39 ment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately at a session of the supreme court of said State of Vermont, in a suit depending in said court between said State of

Vermont and said Edward Hodgson, respondent, a judgment was rendered against the said Hodgson, and the said Hodgson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Vermont, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within — days from the date thereof:

40 Now, the condition of the above obligation is such that if the said Hodgson shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD HODGSON. [L. S.]
WM. H. BLISS. [L. S.]
E. R. HARD. [L. S.]"

Sealed and delivered in presence of—
D. J. CROWLEY.

And on the said 24th day of May, A. D. 1894, it was ordered that the mittimus in said cause be stayed until further order of court.

And upon the said 24th day of May, A. D. 1894, a citation was issued by the said Jonathan Ross, chief judge as aforesaid, and the same was returned into court with service by said Frank L.
41 Fish, State's attorney as aforesaid, duly acknowledged under date of May 25, 1894; which citation is hereto attached.

42 UNITED STATES OF AMERICA, *ss:*

To the State of Vermont, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of Vermont, wherein one Edward Hodgson, of Orwell, in the county of Addison and State of Vermont, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Jonathan Ross, chief judge of the supreme court of Vermont, this 23d day of May, in the year of our Lord one thousand eight hundred and ninety-four.

JONATHAN ROSS,
*Chief Judge of Supreme Court of Vermont.*

43 [Endorsed:] Edward Hodgson, plaintiff in error, *vs.* State of Vermont. Citation. Supreme Court of the United States. Filed June 7th, 1894. Rufus Wainwright, clerk of the supreme court of Vermont for the county of Addison. Hard & Bliss, att'ys for plaintiff in error, Burlington, Vt.

I, Frank L. Fish, State's attorney for the State of Vermont in the county of Addison, hereby acknowledge for said State due and legal service of this citation.

Vergennes, Vt., May 25, 1894.

FRANK L. FISH,
*State's Attorney.*

44 [Endorsed:] United States Supreme Court. Edward Hodgson, plaintiff in error, *vs.* State of Vermont, defendant in error. Writ of error, record, and citation. Wm. H. Bliss, attorney for plaintiff in error.

Endorsed on cover: Case No. 15,700. Vermont supreme court. Term No., 177. Edward Hodgson, plaintiff in error, *vs.* The State of Vermont. Filed October 8, 1894.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

EDWARD HODGSON, Plaintiff in Error,
*against*
THE STATE OF VERMONT. } No. 177.

And now the said Edward Hodgson, plaintiff in error, by William H. Bliss, his attorney, comes and, by leave of the court, files the following assignment of errors in the judgment of the supreme court of Vermont against him, set forth in the record in this cause, and which upon the writ of error in this cause is sought to be reversed, in addition to and not waiving the several assignments of error previously contained and set forth in said record; and he avers that the supreme court of Vermont in said judgment erred in the following decisions made and necessarily involved in said judgment, which he states and assigns as errors—that is to say:

1. That the statutes of Vermont under and in pursuance of which the information upon which the plaintiff in error was convicted, as set forth in the record, being sections 3859 and 3860 of the Revised Laws of Vermont, are not in conflict with the provisions of the Constitution of the United States which require that "in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the law."

2. In deciding that the information under which the plaintiff in error was convicted, as set forth and shown in the record, was sufficient under the said provisions of the Constitution of the United States to found a conviction and judgment upon, and that the plaintiff in error was thereby duly informed of the nature of the accusation against him, and that the said information constituted due process of law, and that in and by said conviction and judgment his privileges and immunities were not abridged nor the equal protection of the *land* denied him within the meaning of the said provisions of the Constitution of the United States.

3. In overruling the motion in arrest of said judgment filed and urged by the plaintiff in error, as stated and set forth in the record, for the reasons and upon the grounds aforesaid, and in affirming the said judgment, conviction, and sentence, whereby rights claimed by the plaintiff in error under the Constitution of the United States and material and necessary to his defence were denied him

by the said supreme court of Vermont and judgment rendered against him in contravention thereof, which is the judgment sought to be reversed upon this writ of error.

EDWARD HODGSON,
By WILLIAM H. BLISS,
*His Attorney.*

[Endorsed:] United States Supreme Court, October term, 1896. Edward Hodgson, plaintiff in error, against The State of Vermont. Assignment of errors. William H. Bliss, attorney for plaintiff in error; office & P. O. address, Burlington, Vt. 177, #15,700. Nov. 2.

[Endorsed:] Case No. 15,700. Supreme Court U. S., October term, 1896. Term No., 177. Edward Hodgson, pl'ff in error *vs.* The State of Vermont. Assignment of error. Filed Nov'r 2, 1896.

No. 177. 26.

Brief of Bliss & Phelps for P. E.

Filed January 9, 1894.

# United States Supreme Court.

**OCTOBER TERM, 1896.**

Office Supreme Court
FILED
JAN 9 1897
JAMES H. McKENNE

EDWARD HODGSON
*plaintiff in error,*

*vs.*

THE STATE OF VERMONT.

**BRIEF FOR THE PLAINTIFF IN ERROR.**

W. H. BLISS and
E. J. PHELPS,
Counsel.

Free Press Association, Printers, Burlington, Vt.

# Supreme Court of the United States.

OCTOBER TERM, 1896.

EDWARD HODGSON,

*plaintiff in error,*

vs.

THE STATE OF VERMONT.

## In Error to the Supreme Court of Vermont.

## Brief for the plaintiff in error.

STATEMENT.

At the June term, 1892, of the County Court for the County of Addison in the State of Vermont, the plaintiff in error was tried and convicted "of one first offence and one second offence," upon an information for selling liquor, filed by the State's Attorney. The information was as follows: (*Record, p. 3.*)

STATE OF VERMONT, }
County of Addison. } ss.

Addison County Court at their June term, begun and holden at Middlebury on the first Tuesday of June, A. D. 1892, within and for the County of Addison.

Be it remembered that Frank L. Fish, State's Attorney within and for said county, comes here into open court in his own proper person, and upon his oath of office gives said court to understand and be informed, that Edward Hodgson of Orwell in the county of Addison and State of Vermont, on the 7th day

of June, A. D., 1892 at Orwell in the county of Addison aforesaid, did at divers times sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the said State's Attorney, on his oath aforesaid, comes and gives said court further to understand and be informed, that the said Edward Hodgson, prior to this time, to wit, at the December term of the county court held at Middlebury in and for the county of Addison, on the first Tuesday of December, A. D. 1891, before and by consideration of said court, was, as appears of record, convicted of selling, furnishing and giving away intoxicating liquors, against the law in such case made and provided.

FRANK L. FISH,
State's Attorney.

It is stated in the record that the State's Attorney "likewise filed specifications in words and figures following :"

STATE vs. HODGSON.

In said case the State's Attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say :

[Here follow the names of sixty-six persons, whose residence is not given.]

" And the undersigned State's Attorney states that he has also specified the offences against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause ; and the State's Attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute.

And the State's Attorney further specifies and relies upon the selling furnishing and giving away of intoxicating liquor by the

respondent within three years before the filing of said information, to some person or persons now unknown to the State's Attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and the discretion of the court may admit.

(*Record p. 3-4.*) FRANK L. FISH,
State's Attorney."

This specification is not required by any statute, and forms no part of the information. It is, however, provided by statute that "*when* a specification is *required*, it shall be sufficient to specify the offences with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and where the specification sets forth the sale, furnishing or giving away to any person or persons unknown, the witnesses produced may be enquired of as to such transactions with any person, whether named in the specification or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification upon such terms as to a postponement of the trial for this cause, as the court shall think reasonable." (*Stat. of Vt. 1886 No. 37.*)

It does not appear from the record that the specification was asked for by the respondent, nor whether the offences of which he was convicted were for selling, furnishing, or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. These proceedings were based upon sections 3802, 3803, 3859 and 3860 of the Revised Laws of Vermont, (Revision of 1880:) as amended by No. 42 of the Acts of 1888, which are as follows:

SEC. 3802. If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps or possesses with intent to sell, furnish or give away intoxicating liquor or cider, in violation of law, he shall forfeit for each offence to the State, upon the first conviction not less than five nor more than one hundred dollars, and may also be imprisoned in the discretion of the court, not more than thirty days; upon the second and

each subsequent conviction, not less than ten nor more than two hundred dollars for each offence, and shall also be imprisoned not less than one month nor more than one year.

SEC. 3803. Justices shall have concurrent jurisdiction with the county court in prosecutions under the preceding section, and the same may be tried upon the complaint of a grand juror of the town, or of the State's Attorney, before a justice, or upon the information of the State's Attorney, before the county court.

SEC. 3859. Complaints for any offence against Section 3572, (Section 3802), shall be substantially in the following form:

STATE OF VERMONT, }
———COUNTY, SS. } To A. B., justice of the peace for the county of———, comes C. D., grand juror of the town of ———, in said county, and complains that E. F., of———, on the———day of———, A. D.———, at———, did at divers times, sell, furnish or give away (as the case may be), intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

C. D., *Grand Juror*.

SEC. 3860. Under the foregoing complaint every distinct act of selling, furnishing or giving away may be proved, and the court shall impose a fine for each offence.

Before trial the plaintiff in error filed a motion to quash the indictment. (*Record p. 4-5.*) This motion was overruled by the court, to which decision the plaintiff in error duly excepted. The case was carried by the plaintiff in error to the Supreme Court of Vermont upon exceptions to the overruling by the County Court of his motion to quash, and upon other exceptions taken at the trial, and not material here, as they raise no federal question. Judgment and sentence having been stayed in the County Court, to await the result of the hearing in the Supreme Court. (*Record, p. 3, Fol. 10.*)

In that Court the plaintiff in error filed a motion in arrest of judgment, which he was allowed by the Court to do, and the

same was taken into consideration and passed upon by the Court.

The motion in arrest will be found in the record, pp. 6-7-8. The grounds set forth are in substance: that the information upon which the conviction was had is insufficient and void, and lacking in substance in various particulars specified in the motion; that the respondent was deprived of his right to be informed of the nature and cause of the accusation against him; that he was convicted of two infamous crimes without due process of law; and denied by the State the equal protection of the law; that the statutes of Vermont under which the proceedings were had are in conflict with the provisions of the Constitution of the United States and especially that provision of the fourteenth amendment which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the law."

The Supreme Court of Vermont affirmed the judgment of the County Court refusing to quash the information, and overruled the motion in arrest. And proceeded to render judgment upon the verdict, and sentenced the plaintiff in error to pay a fine of $30 for the first offence and $70 for the second offence, with costs taxed at $197.36, and to be confined at hard labour in the House of Correction at Rutland for the period of 60 days, "with alternative sentence." (*Record p. 19.*) The alternative sentence is, that in case of failure to pay the fine and costs within twenty-four hours, the respondent be confined in the House of Correction for the term of three days for each dollar, in addition to the period for which he is sentenced. (*Rev. Laws Sec. 4336.*)

The reasons for this decision and judgment will be found in the opinion of Ch. Jus. Ross. (*Record, pp. 8-19.*) The case is reported in the *66 Vermont Rep. p. 134.* The Court decided in substance that the information was sufficient; that it constituted due process of law: that the statutes in question and the pro-

ceedings under them did not infringe any provision of the Constitution of the United States. The right claimed by the plaintiff in error under the Constitution, and his sole ground of defence in the Supreme Court of Vermont, was therefore denied.

To reverse that judgment is the object of this writ of error. The assignments of error upon which the petition for the writ was based, will be found in the *Record, pp. 20-23*, and cover all the points above mentioned. And further assignments of error were filed in this Court to the same effect. (*Record, p. 26.*)

## POINTS.

I. The conviction of the plaintiff in error, and his sentence to fine and imprisonment at hard labour, were without "due process of law," and were therefore in contravention of the provisions of the fourteenth amendment to the Constitution of the United States.

1. The offences of which he was found guilty are made infamous offences by the statutes of Vermont, because they are made punishable by confinement at hard labour, in the House of Correction.

In *Ex parte Wilson 114 U. S. Rep. 417*, it was held that any crime, punishable by imprisonment at hard labour, is an infamous crime.

In the case of *Mackin vs U. S. 117 U. S. Rep. 348*, the court says: "We cannot doubt that, at the present day, imprisonment in a State Prison or penitentiary, with or without hard labour, is an infamous punishment. It is not only so recognized in the general opinion of the people, but it has been recognized as such in the legislation of the states and territories, as well as by Congress."

To the same effect are:

*In Re Medley, 134 U. S. 160.*
*In Re Clauson, 140 U. S. 200.*
*Rosen v. U. S. 161 U. S. 440.*
*Op. of Mr. Jus. White.*

The statute (before quoted) under which these prosecutions take place, requires only imprisonment, without specifying that it shall be at hard labour. But the Revised Laws (1880), then in force (*sec. 4365*) provide as follows :

"Where an offence is declared by law to be punishable by imprisonment, and it is not specified that such imprisonment shall be in the state prison, it shall be considered to mean imprisonment in the House of Correction, if the offender is over sixteen years of age, if a man, or fifteen if a woman, at the time of conviction."

And sec. 4378 provides that :

"Persons sentenced to imprisonment in the House of Correction shall be kept at hard labour therein during such imprisonment."

2. In such cases, and in all prosecutions for crime in courts of record, due process of law requires an indictment, or at the least an information. It has never been held or claimed in any court that this may be dispensed with.

3. It is equally well settled that due process of law requires that the indictment or the information, (which is subject to precisely the same rules,) should contain a specific and certain description of the precise offence charged, sufficient to enable the respondent to know what he is to meet, and to prepare his defence : sufficient to prevent his being indicted for one offence and tried for another ; and to make the record, whether upon conviction or acquittal, a bar to another prosecution upon the same charge. Short of this it would not be an indictment.

That this was the requirement of the common law of England as adopted in this country, and as ever since maintained in Great Britain, will not be denied.

*1 Arch. Cr. Pl. and Prac. 291.*

It is likewise fully established as American law, and as a necessary feature in due process of law within the meaning of these words in the Constitution of the United States.

Says Judge Cooley, (*Cons. Lim. 327, 6th Ed.*) "The Legislature have no power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of the offence." And again (p. 374) "The accusation, whether by indictment or information, must be sufficiently specific fairly to apprise the respondent of the nature of the charge against him, so that he may know what he is to answer, and so that the record may show, as far as may be, for what he is put in jeopardy."

Says Judge Story, (*Com. on Constitution, Sec. 1779,*) "The indictment must charge the time and place and nature and circumstances of the offence, with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defence with all reasonable knowledge and ability."

Says Mr. Justice Harlan, speaking for this Court, in the case of *Rosen v U. S. 161 U. S. Rep. 407*, "The doctrine to be deduced from the American cases is, that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist at the outset by demurrer or motion to quash, and after verdict by motion in arrest of judgment, that the indictment shall apprise him of the crime charged, with such reasonable certainty that he can make his defence, and protect himself after judgment against another prosecution for the same offence."

*In Evans v. U. S. 153 U. S. Rep. 587.* This Court, through Mr. Justice Brown, says: "The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. * * * Even in the case of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offence intended to be charged, not only that the former may know what he is called upon to meet, but that upon a plea of former acquittal or conviction the record may show with accuracy the exact offence to which the plea relates."

Mr. Justice Field in delivering the opinion of this Court in *U. S. v. Hess, 124 U. S. Rep. 485*, says: "The general, and

with few exceptions, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offence must be stated. The doctrine invoked by the Solicitor General that it is sufficient in an indictment upon a statute to set forth the offence in the words of the statute, does not reach the difficulty. Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied by such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.

In the *State v. Leonard, 47 Maine*, the court says: "But in criminal prosecutions, the exercise of this right" (the regulation of process) "is limited and controlled by the paramount law in the constitution. It has for centuries, since the declaration in Magna Charta, been the boast of the common law that it protects with jealous care the rights of the accused. It not only secures a speedy and impartial trial by jury, but it requires that no person shall be held to answer until the accusation against him is formally, fully and precisely set forth, that he may know of what he is accused, and be prepared to meet the exact charge against him. This right of the respondent has ever been regarded as sacred and essential to the protection of the individual citizen. In all the changes of the forms, and in the principles and practice of the law, this right has remained untouched and unchanged. The people have not been willing to leave it without the express sanction of the constitution."

Says Chief Justice Gibson in *Hartmann v. Commonwealth, 5 Penn. St. 60, 66*: "Precision in the description of the offence is of the last importance to the innocent; for it is that which marks the limits of the accusation and fixes the proof of it. It is the only hold he has on the jurors, judges as they are of the fact and the law."

See also to the same effect:

*U. S. v. Mills, 7 Pet. 291; U. S. v. Cook, 17 Wal. 174; U. S. v. Cruikshank, 92 U. S. 523.*

Also *Com. vs. Thurber, 41 Mass. (24 Pick. 374.) Whitney vs. State, 10 Ind. 404 ; McLaughlin vs. State, 45 ib. 338 ; State vs. McKinstry, 50 ib. 465 ; Sandringham vs. State, 49 ib. 186 ; Scudder vs. State, 62 ib. 43 ; Miller vs. State, 79 ib. ; State vs. Doyle, 11 R. I. 574 ; McKenna vs State, 17 All. (R. I. 51) ; Saco vs. Wentworth, 37 Maine ; Murphy vs. State, 24 Miss. 590 ; and 28 Miss. 637 ; Capritz vs. Maryland, 1 Md. 569 ; Darwin vs. State, 34 Ala. 216 ; Bryan vs. State, 45 ib. 86 ; State vs. Faucett, 4 Dev. & Bat. (N. C.) 107 ; State vs. Cox, 29 Mo. 475 ; State vs. O'Flaherty, 7 Nev. 153 ; Bishop on Stat. Cr. sec. 1036 ; Williams vs. State, 12 Texas App. 395 ; Brown vs. People, 29 Mich. 232 ; People vs. Olmstead, 30 ib. 431.*

4. Tested by these just and unquestionable rules, the information in the present case utterly fails, in the most important and substantive particulars, to meet their requirements.

(*a.*) It does not charge any specific offence whatever.

The offences created by the statute on which the prosecution is founded are not a continuous course of dealing, nor the becoming a dealer, nor is any such charge made. They are specific sales to individual purchasers, each of which is a separate crime, to which a separate penalty attaches.

These offences may consist either in "selling, furnishing, or giving away." Each of these is a transaction different from the others, and to be established by different proof. Which of them is intended to be charged, in the present case, the information does not disclose.

It is held in Vermont that these offences are different, and that a conviction for one can not be had on an indictment charging another.

*State v Freeman 27 Vt. Rep. 523.*

Even the statute of Vermont requires the offences to be discriminated in the complaint. (*See statute form supra.*)

Suppose that a statute should provide that if any man should commit an assault with intent to kill, or to commit rape,

or to commit mayhem, he should be punished by a certain term of imprisonment. And that in such case two or more offences might be joined in the same indictment and in the same count. Would it be contended that an indictment could be sustained as due process of law which charged a respondent with committing assaults with all these intents upon divers persons at divers times, without further specification? And that the respondent might be convicted under it of "two offences," not specifying which or what?

While it may be true that, contrary to the rule of the common law, more than one offence may be charged in a single count without violating the requirements of due process of law, it is not true that an indictment can be so framed as to charge an indefinite and unlimited number of offences. No known rule of law allows that, and common justice to the respondent, and a decent regard to the proprieties of judicial proceeding forbid it.

The objection is not that more than one offence is charged. It is that no offence that can possibly be proved is excluded. The conviction may be for one crime or for a thousand.

(b.) No attempt is made in the information to state with any reasonable certainty the time when the offences charged or any or either of them occurred. The averment is that the respondent, on the 7th day of June, 1892, did, *at divers times*, sell, furnish, and give away intoxicating liquor. The term at which the information was filed, is stated therein to have begun on the first Tuesday of June, which could not have been later than the 7th. In the "specification" filed by the State's Attorney on the 24th day of June, (the effect of which will be considered hereafter,) it is set forth that the attorney "will rely upon and expect to prove the fact that the respondent, *within three years* before the filing of the information in the said cause, sold, furnished, and gave away, to the following named persons, or to some one, or more of them," naming sixty-six persons. And further specifies and relies upon the selling, furnishing, and giving away, &c., "within three years before the filing of information, to some person or persons now

unknown to the State's Attorney, and claims the right to add the names of such persons when ascertained."

It is said that time in an indictment is not material. That is true upon a question of variance, when the crime turns out to have been committed on a different day from that named. But the reasonable attempt at such an averment of the date as is fairly necessary to certainty of description, is a very different thing, and has never been dispensed with. It is apparent on the face of these proceedings, that so far from any attempt being made to give the respondent notice of the approximate times within a period of three years, when were committed any of the numerous offences attempted to be relied on, or of the innumerable offences expected to be relied on so far as they might be discovered, any such embarrassment to the prosecution was sedulously and successfully avoided.

(c). The name of no person to whom liquor was alleged to be sold, furnished or given away is stated in the information. This is an element of description of the offence that is indispensable, because in an information of this character no other sufficient description of the offence is possible.

It has been often decided, and by courts of high authority, that in indictments or informations for selling liquor, it is necessary, in order to comply with the constitutional requirements, to give the names of the persons to whom the sales are charged to have been made, because in no other way can the offences charged be sufficiently described or identified.

In *Com. v. Thurber, 24. Pick. 374, per Ch. Jus. Shaw*, it was held that when the indictment is for doing a specific act of liquor selling, it "must charge the doing of that act with the usual precision and certainty requisite in other cases," and that the name of the purchaser must be given.

In *State v. Doyle, 11 R. I. 574*, where in a similar case a respondent was indicted for selling, without stating to whom, Ch. Jus. Durfee in delivering the opinion of the court, after stating

the general rule as to the certainty required in an indictment, and the reasons on which it rests, says, "It is evident that this right has not been duly respected in the complaint before us. The offence charged is not so identified as to give the defendant certain information of what in particular she was accused, so that she may have been indicted for one offence when she was accused of another totally distinct from it. Her right to be informed of the nature and cause of the accusation is a constitutional as well as a common law right, and ought to be carefully guarded and maintained. It is true that even naming the purchaser is not always a perfect mode of identification, but it is the approved mode, and is perhaps as perfect as any that can be devised." After adverting to the practice that had long prevailed to draw complaints in the form of that before the court, he said, "we do not see how upon either principle or precedent the practice can be upheld."

In *McLaughlin v. the State, 45 Ind. 338*, where the statute of the state provided that in prosecutions under the liquor law it should not be necessary to state the name of the person to whom sold, the court held the statute unconstitutional, and through Ch Jus. Downey said, "It is little less than mockery to furnish the defendant with a copy of such an accusation. * * * The legislature has not the power to dispense with such allegations in an indictment, as are essential to reasonable particularity and certainty in the description of the offence."

To the same effect are *State v. Cox, 29 Missouri 475. Darwin v. State, 34 Ala. 216, State v. Fawcett 4 Dev. and Battle (N. C.) 107, Endens v. People (per Campbell J.), 20 Mich. 233.*

And the constitutional requirement in indictments is so stated in *1 Bishop's Crim. Pro., Sec. 107-108.*

*In U. S. v. Simmons, 96 U. S. Rep. 360*, it was held that an indictment that charged the respondent with causing or procuring some other person to use a still for the purpose of distilling, is bad on motion in arrest, unless it states the name of such other person or avers that the same is unknown.

In the case of *Rosen v. U. S. 161 U. S. Rep 407*, which was an indictment for sending obscene matter, it was held that re-

citing the matter in question in the indictment might be dispensed with, solely on the ground of the exception to the general rule which excuses from defiling the records of the Court with indecent matter, if the paper in question is otherwise sufficiently identified, (as in the opinion of the majority of the court it was,) to give the accused proper information of the charge against him, and to protect his rights. But even in that case two of the learned judges dissented, on the ground that without reciting the paper such information and protection were not by the remainder of the indictment sufficiently afforded.

What would have been said to that indictment if it had merely charged the respondent with sending divers obscene matters to divers persons unnamed and unnumbered, at times not stated, within three years before the indictment was found?

See also, *U. S. v. Cruikshank, 92 U. S. Rep. 542.*

In the case of *O'Neil v. Vermont 144 U. S. 324*, a similar question was attempted to be raised, but it was held by the majority of the Court that it was not raised, and the writ of error was therefore dismissed without considering the question.

But Mr. Justice Field, who, with two of his learned associates, dissented from the opinion of the majority of the Court on that point, used this language in respect to the question now under discussion:

"The complaint against the accused describes, as I have said, only a single offence, that of selling, furnishing and giving away intoxicating liquor without authority. It designates no person or persons to whom such liquor was sold, furnished or given away, nor specifies any number of offences, but charges that the offence named was committed at 'divers times.' And yet he was tried and convicted under this complaint of three hundred and seven distinct offences, and punishment was imposed for each one. * * * * Due process of law required a specific description of all the offences for which the defendant was to be put on trial. Proceeding without it was not due process of law; and in my judgment, no legislation of Vermont could make it so. * * * * * * *

"It is the established rule of law which has prevailed in England and in this country since the revolution of 1688, if not for a period anterior to it, that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him. It is the law of every civilized community, and *in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed.* The information which he is to receive is that which will acquaint him with the essential particulars of the offence, so that he may appear in court prepared to meet every feature of the accusation against him." Quoting with approval the language of Ch. J. W. Gibson, *supra.*

From this language no member of the Court expressed dissent. The only point decided by the majority was that the federal question was not raised.

It is of course not meant to be asserted that in a case where a specific offence is charged and sufficiently described, but the name of the party upon whom it is committed can not be ascertained, an indictment can not be framed. Doubtless a man might be indicted for murder and convicted, though the name of the victim was unknown, if the offence was otherwise sufficiently described.

The objection is to an indictment that describes in no way any specific offence, but charges in general terms an indefinite and unlimited number of offences not specified, described or identified in any particular and not attempted or intended to be.

*d.* No attempt whatever is made in the information to supply in any other way the want of description of the offences charged. Neither the place (within the town of Orwell) where the sales, furnishings or giving away are claimed to have taken place, the kind or quantity of "intoxicating liquor" so disposed of, or any other circumstance that would tend to identify the transactions referred to, or to show which of the three offences

was intended to be alleged, or the time, within three years, of their supposed commission, is stated in the information.

It is not contended that the absence of these minor particulars in an information otherwise containing a sufficient description of the specific offences, would be fatal to it. But only to point out that no other attempt at description in any way whatever, is made.

5. The information is not aided in any respect by the "specification" filed.

(*a*) That forms no part of the information, and, whatever it contained, would not supply either the want of an information, nor, what is the same thing, defects in it which render it void under the constitutional requirement. It will not be contended that it would be the subject of a motion to quash, a demurrer, a plea, or a motion in arrest. Nor that any such pleas or motions could be addressed to the information, predicated upon the contents of the specification.

(*b.*) Nor is it a part of the record. As will be pointed out hereafter, it is a document to be "furnished," if at all, *to the respondent.*

*Bishop's Crim. Procedure, Sec. 643-646, last ed.*

(*c*) It is not required by any statute, nor is it a matter of right. It is furnished under a practice that has grown up in consequence of an *obiter* intimation of the Supreme Court of Vermont, in the case of *State v. Conlin, 27 Vt. Rep. 318*, where it was first suggested. The Court say:

"It was held by the Court in *State v. Parker*, and we think correctly, that under one complaint the prosecution might show any number of offences, being bound, *if required, to give the respondent* before trial a specification of the nature of the offences which he would attempt to prove." But in *State v. Parker*, which is reported in *26 Vt. Rep. 357*, not a word is said about a specification, nor does it appear that there was one,

or that any question respecting the right to one arose. It was held in that case that a man was properly convicted of four offences charged in one count under the Act of 1852. In *State v. Bacon, 41 Vt. Rep.* 526. it was held that the right to a specification arose under the decision of the court in *State v. Conlin*, but that it was a matter of discretion with the court "to be exercised with reference to the circumstances of the case," and in that case a very loose and imperfect specification was held sufficient. In *State v. Davis, 52 Vt. Rep. 376*, the specification charged "the selling, furnishing and giving away intoxicating liquor, five different and distinct times, on each and every successive day of each and every successive month of 1876, 1877, and 1878, to each and every person whose name was appended," concluding with a long list of names. The respondent objected to this specification, but his objection was overruled. After conviction he carried the case to the Supreme Court on an exception to this decision. That Court commented severely upon the character of the specification, describing it as "mere shunnage," not designed to inform the respondent of the offences intended to be proved, but to prevent him from being informed. But held that the specification was not a matter of right, but only an application to the discretion of the court, and that the decision upon it could not be reviewed in the appellate court. The case of *State v Woolley, 59 Vt. Rep. 337*, is to the same effect.

After the decision of the Supreme Court of Vermont authorizing a specification to be furnished to the respondent, the Legislature intervened by the passage of the Act of 1886, quoted in full *supra* p. 3, which provides in substance that *when* a specification is "*required*", it shall be sufficient to specify with such certainty as the prosecutor "*may be able*;" that it may be amended at any stage of the trial: that witnesses may be enquired of as to the sale, furnishing, or giving away, to any person, *whether named in the specification or not, and that the name of such person may be inserted in the specification.*

While ostensibly following therefore, the intimation of the Supreme Court in *State v Conlin*, in allowing a specification, both Court and Legislature have united in denying that there is any

right to it, and in authorizing it to be framed, when given, in such a manner as to be of no use whatever to the respondent.

(*d.*) But if it were possible that the specification could be attached to the information as a part of it, or as a substitute for it. the objection is increased and intensified, because the information would be made worse instead of better.

The information charges sales to "divers persons" on the 7th day of June, and "on divers days." The specification, while giving the names of sixty-six persons whose residence is not given,—perhaps because they had no residence,—extends the charge to divers other persons unknown, to whom sales, &c., were made within three years next before the information, whose names the prosecution reserves the right to include in the information when discovered, with other amendments.

The specification is therefore much broader, and even less specific than the information, and enlarges instead of restricting it.

6. The respondent can not plead to such an information intelligently, but must necessarily plead not guilty.

He might desire to plead guilty to some or all the charges, if he knew what they were, and thus save the expense of a trial, and entitle himself to consideration in mitigation of punishment. This is his right, even though guilty. He might wish to plead a former conviction or acquital. It appears from the record that he had been previously prosecuted. He might wish to plead a pardon. All these pleas would be equally impossible to be addressed to such an information.

In the case of *Hapt v. Utah*, *110 U. S. Rep. 579*, a judgment of conviction was reversed by this Court, because *the record did not show* that the respondent had been put to plead, though tried and found guilty, and though he had made no objection on that score. If this right is so important to the accused that it can not even be waived by his own consent, nor presumed to have been accorded until the contrary is asserted, how

much more important is it that the indictment should be so framed as to admit of a plea.

7. Nor does such an information protect the respondent in the least against being prosecuted for one crime and convicted of another.

What supposed offences were originally the foundation of the prosecution can only be known to the State's Attorney. Whether the conviction was for either of them or for some subsequently discovered offence, can never be known.

Yet, as has been seen, such protection is not only demanded by common justice, but has always been held to be one of the cardinal requirements in an indictment.

8. Under this information it is, and must remain, utterly uncertain what particular two offences the respondent was convicted of. Whether the jury all agreed as to any two specific offences, either of selling, furnishing or giving away, or whether each of the jury was satisfied in respect to two different offences of one kind or the other, and so concurred in the general verdict, without any agreement as to any one offence of either kind, can not be known.

Such a conviction cannot be regarded as due process of law.

9. The record of an acquittal or conviction upon such an information, forms no bar to a second prosecution for the same offence. A requirement in an indictment which has been before shown by the repeated declarations of this Court, not only to be indispensable but to have been universally so held.

The only authority to the contrary is to be fonnd in the suggestion of the Supreme Court of Vermont, in the opinion in this case, that this objection is without foundation, because the former conviction or acquittal *may be established by parol evidence.* (*Record p. 16.*) That is to say that, under an information admitting of proof of an indefinite number of offences by selling, furnishing or giving away to persons unnamed, and at times not

stated, when forty or fifty witnesses are called, as in this case, in reference to as many different charges, and the respondent is found guilty" of one first offence and one second offence, (*Record, p. 5*) the respondent, if prosecuted again, will be expected to show by parol not only what the evidence was on the trial, but what offences were in the minds of the jury in returning the verdict. It is by the record that a plea of former conviction or acquittal must be established. And it is the plain right of the accused to have a record that affords him this protection.

It might perhaps be suggested that the conviction on such an information may be held a bar as to all prior offences. But the Statutes of Vermont provides expressly to the contrary. (*Rev. Laws. Sec. 3807.*)

10. This information must be judged by the same rules that apply to all other indictments and informations in courts of record, especially to those which charge infamous crimes.

Such is the view of them held by the courts of Vermont. In *State v. Haley, 52 Vt. Rep. 476*, it is said of them: "This class of statutory crimes stands for the same consideration and is subject to the same rules of law as any other crimes." And in *State v Davis, 52 Vt. Rep. 376*: "This class of cases is no exception to the generality of criminal cases."

In respect to the protection afforded by the constitution to the accused it is impossible to state any distinction between this and other infamous crimes. And if any could be found, it would be in favor of a stricter protection in cases like this. For there is no crime known to the laws of Vermont, in punishment of which such enormous fines and protracted imprisonment are imposed, as in these. True, this is by what is called a repetition of "second offences." But if a man having been once convicted, sells to or treats a dozen persons at once, all the instances are second offences. And if he becomes a dealer for three days, and sells to a hundred persons in that time, he commits so many second offences.

What would be said to an indictment that charged a respondent with divers murders or robberies upon persons not named, within three years next preceding, with not a word from which the particular crime or crimes referred to could be inferred, and this under a statute which authorized proof under such an information of an unlimited number of offences, whether those originally intended or others afterwards discovered. And what would be said of a conviction under such a proceeding, of "two offences," out of many attempted to be proved, without specifying, or leaving it possible to discover, what offence, or upon whom ?

It is said to be desirable to suppress the traffic in intoxicating drinks. But not more desirable in the estimation of rational men than the repression of murder, rape and other felonies. Neither can be accomplished by a disregard of constitutional safeguards, and the established proprieties of judicial procedure. If the sale of liquor is elevated by legislation into an infamous crime, those charged with it become entitled to the same constitutional protection that is accorded to the persons accused of other infamous crimes. And due process of law will be found in all cases much more effectual for the punishment of guilt, as well as for the protection of innocence, than the blind efforts of a frantic fanaticism, which under pretended forms of law violates its fundamental principles.

11. The information and the statutes on which it is founded, should be considered in connection with other provisions of the same law applicable to the case.

By the statute in force when this prosecution took place, *Laws of Vermont, 1886, No. 41*, one-fourth of all the fines and penalties *mentioned* in the sections providing for fees and penalties, go, upon conviction, to the complainant, when complaint is made, *otherwise to the prosecuting officer*. And for every *conviction* of a second offence obtained, the prosecuting officer receives the sum of *fifty dollars*. And in case bail is forfeited by the respondent in such prosecutions, *twenty dollars* of the for-

feited bail goes to the same officer. These allowances are in addition to his regular compensation, and are only given in *case of conviction*, or of the forfeiture of bail.

The officer therefore in whose sole discretion it is to institute this prosecution by filing the information, and to include under it on the trial such and so many charges of crime as he thinks proper, without previous notice to the accused, is placed under a direct and heavy bribe contingent on conviction, and increasing to an unlimited extent in proportion to the number of offences embraced in it.

We deny that a conviction thus obtained is upon due process of law. For it contravenes the fundamental principles of justice and law upon which all judicial proceedings repose.

The question whether a man shall be put on his trial for an infamous offence, is a judicial question, and a very grave one. The sole function of the grand jury, sitting as a judicial body, is to determine it. Could a conviction be deemed to be founded on due process of law, if each member of that body was stimulated by a fee of fifty dollars to be paid on conviction, together with a share of the fines imposed? And could a law providing for such payments be held constitutional as against the convicted respondent? As well might the judge and the jury who try the cause have a similar interest in the result.

The State's Attorney, if allowed to proceed against a respondent by information founded upon his oath of office, takes the place of the grand jury, and so far acts judicially. He can no more therefore, have a direct interest in the result than they can, without vitiating the proceedings.

And though not the judge on the trial, he is, in the prosecution, an officer of the Court and the representative of the State. It is not the purpose of the State nor the object of the prosecution to obtain convictions whenever possible, but to do justice; to see as well that they are not convicted who are not proved to be guilty, as to condemn those who are. And it is fatally inconsistent with the just attitude of a prosecuting officer that he should have a large and perhaps an enormous pecuniary interest in

putting a man to trial, obtaining a conviction, and the largest conviction possible.

The prosecution of all criminal cases has from time out of mind been entrusted in all courts under the common law to public prosecuting officers and to counsel solely representing the State. Counsel for private or interested parties are not allowed to intervene. The reason is that the prosecutor—like the judge, the jury and the grand jury—must have no interest inconsistent with an attitude of just impartiality of conduct.

If this feature in the law under which the plaintiff in error was convicted stood alone and afforded the only objection to the proceedings, we should respectfully submit that the judgment could not stand.

But it does not stand alone. It is to be taken in connection with and as a part of the statutes in question, all of which conduce to and have effect in the result complained of. The question of the sufficiency of this information as a substitute for an indictment is to be considered in the light of the further question, in whom and under what inducements to do injustice to the respondent is this discretion to disregard settled rules of precedure to be reposed. The question is, whether such an information, so obtained, is due process of law.

12. This proceeding is not an information. It is a mere drag net or fishing bill, such as is not tolerated even in civil litigation. It is well compared by the learned judge who delivered the opinion in the record, to *the general counts in assumpsit*, an extraordinary analogy by which to determine the requisites of an indictment, and for which no previous authority is known to exist.

It is not intended to prosecute for any specific or known offence, but to afford an opportunity without any specific charge at all to call before a jury as many witnesses as it may be thought possible to obtain information from, and if upon examation of them any evidence tending to prove any offence of either of the three kinds is elicited, to go for conviction of all

the offences so discovered. Such is the obvious design of the statutes.

That was the character of the present case. The record discloses nothing about the evidence on the trial. But the specification contains the names of sixty-six persons. The amount of the costs ($197.36) shows that a large number of witnesses must have been summoned, since without witnesses the costs could not under the statutes of Vermont have exceeded, and probably fell short of, $50. And the allowance to witnesses is $1 per day. Out of all these, proof of only two offences was obtained. It is obvious therefore that the witnesses were summoned not to prove any known case, but for the purpose of ascertaining what information could be elicited that might tend toward establishing any case at all.

13. That a State may prescribe and regulate criminal process within its jurisdiction, is not denied, provided that in so doing it does not infringe the reqnirements of the constitution of the United States. That no action it can take, by legislature or court, or by both combined, can be allowed to violate those requirements, when thereby it results that any person is deprived of life, liberty on property without due process of law, or is deprived of the equal protection of the laws, requires neither argument nor authority to prove. Nor is it material by what agency that result is attained.

As remarked by this Court in *Ex parte Virginia*, *100 U. S. Rep. 347*:

"Whoever by virtue of public position under a State government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of, and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."

It is not claimed that the information in the present case violates the constitutional provision merely because it is

defective in the form or technical requisites usual in the criminal law, and is therefore open to demurrer. On such an objection the decision of the State court or the action of the State legislature would be final.

Such was the case and such the decision in *Caldwell vs. Texas, 137 U. S. 692*, where the Court by Ch. Jus. Fuller, states with great clearness the distinction between defects of form and those that are fundamental.

By due process of law in criminal proceedings is meant not only that they should be in accordance with those general "rules that govern society," but likewise with the fundamental principles of judicial procedure. There can be no principle of proceedure more fundamental in its importance, more necessary to the accused, or more firmly established in the law of the land, than that which in the language of the constitution entitles him "to be informed of the nature and cause of the accusation against him." What that clause means has long been settled by the decisions of this Court, which in giving authoritative construction to the constitution, become a part of it. And that definition, reposing as it does on three cardinal points vital to the rights of the accused, and indispensable to the impartiality and the decency of the administration of public justice, is the criterion by which, as we respectfully submit, the information in this case should be tested. Does it give to the respondent such fair and precise notice of the charge against him as to enable him to defend himself? Does it afford such an indentification of the offence on the record as protects him from being indicted for one crime and convicted for another. And does it make the record a bar to his being again put in jeopardy for the same charge, after having once been convicted or acquitted of it?

And to these may be added another enquiry: do the statutes on which it is based violate one of "the rules that govern society," by making the judicial authority whence the information emanated a judge in his own case.

That is the very illustration given by Judge Cooley, of a judicial proceeding that would infringe those principles, quoting from an eminent English Judge.

*Cooley Cons. Lim. p. 411.*

II. By the proceedings in this case the plaintiff in error was "deprived of the equal protection of the laws."

That takes place when any man or set or class of men is dealt with by a State in respect to life, liberty, or property, upon a different system of law from that which is applied by that State to men in general, in similar cases, or, in other words, the general law. This provision of the constitution requires, as said by Mr. Justice Field in *Barbier v. Connally, 113 U. S. 29*: "That equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights."

Those persons in Vermont who are accused of selling or giving away liquor are denied by these statutes the protection extended by the general laws of the state to all others accused of any crime known to the law. In no other case can such an information as is now under consideration be filed. In no other case can an indictment be found or an information filed by authority pecuniarily interested in conviction. In no other case can new offences be added during trial to those charged against the accused in the original proceeding, or a record made up on his conviction or acquittal that affords him no protection against being again prosecuted for the same offence.

Whatever penalties may be enacted against particular offences, different from or more severe than against other crimes equally or more heinous, the right of the accused to the protection of those methods of procedure necessary to justice, is equal in all cases. Even a man charged with giving his friend a glass of beer, is presumed to be innocent until he is legally proved guilty, and has the same right to a legal and fair trial under the general law as if he had committed a less serious offence. If deprived of that right, accorded by the law of his state to all who are accused of other crimes, on account of the nature of the offence of which he is accused; and in order to make his conviction more easy or more certain, it is not to be questioned that he is deprived of the equal protection of the

laws, within the meaning of the constitution. Such is precisely this case.

It is unnecessary to elaborate the argument on this point, since it is but another mode of stating the propositions already advanced in respect to due process of law.

III. The conviction of the plaintiff and his sentence to infamous punishment was without due process of law, because he was not indicted by a grand jury.

This objection was distinctly raised by the notice to quash. (*Record, p. 4.*)

In view of the decision of this Court, in *Hurtado v. California, 110 U. S. Rep. 516,* it is not proposed to enter into the extended argument on this point or the citation of authorities necessary to its proper discussion, for two reasons. We can not regard it as necessary to the reversal of the judgment to which this writ of error is directed. And we could add nothing to the argument of the powerful dissenting opinion in that case.

But should it be found necessary to the disposition of the cause to decide the question, we most respectfully insist that the decision in *Hurtado v. California* is erroneous.

The rule of *stare decisis* is a very important one, and is in a considerable class of cases decisive. But where the question concerned affects one of the most essential rights of an accused person under the constitution of the United States, in cases involving his liberty or his life, it can never be too late to ask for a reconsideration of it. Such a question can never be regarded as finally decided, until it is clear that it is decided right.

The authority to the contrary includes the great names of Kent, Story, Shaw, Curtis, Bronson and Cooley, as well as that of many courts and judges of lesser distinction. And it may well cast a doubt upon the decision even of this high court of the last resort.

It can never be successfully maintained, we respectfully contend, that any requirement in criminal procedure so essen-

tial to justice that the constitution includes it among the fundamental rights, does not form a necessary part of due process of law as intended by the constitution. Otherwise the constitution contradicts itself. If one may be dispensed with, all the other rights of an accused person enumerated in the fifth, sixth and eighth amendments may, each in turn, be dispensed with. For they all stand in that instrument on the same foundation, and are declared in the same language, in the same connection and for the same purpose. Indeed, every one of the rights secured by these amendments to the accused, has been taken away in liquor cases by the Statutes of Vermont, except the right to be confronted with the witnesses against him and to have the assistance of counsel.

It is a matter of familiar knowledge that the rights set forth in these amendments were originally omitted from the constitution because they were deemed to be such fundamental and undeniable rights under the common law, that they would be disparaged if thought necessary to be protected by express enactment. And when later it was perceived that they must be expressed in the constitution in order to prevent them from being destroyed by legislation, the amendments in which they were contained, only crystalized the principles of the common law that had prevailed ever since Magna Charta. But whether they were law before or not is now immaterial, since when they were embodied in the constitution they were made for ever a part of the supreme law of the land.

The present case is a most instructive illustration of the consequences of departing from the requirement of the common law and of the constitution of the United States, that an indictment by a grand jury shall precede a conviction for an infamous offence. When a mere information is once allowed, the result is seen in the present record. And it is to be remembered, that under the statutes of Vermont before cited, jurisdiction is given to any justice of the peace to take cognizance of a case like this, concurrently with the higher courts. So that such a magistrate, upon such an information by a town grand juror, has power to sentence a man to a fine of an indefinite and enormous

amount, and to an imprisonment longer than the period of his natural life. And this without any jury trial, unless it be by a jury of six men selected by a constable from the town where the trial is had. True, there is a right of appeal. But only upon giving bail to an amount that in such cases would be beyond ordinary means.

The case of O'Neil before cited, in which there was a conviction of three hundred and seven offences under a single count in an information of this sort, a fine of $6,638, and a sentence of imprisonment of fifty-four years, shows what may take place under these statutes.

In this connection the language of this Court as expressed by Mr. Justice Bradley, in *Boyd v. U. S., 116 U. S. Rep. 635*, is most pertinent, though referring to matters far less in importance than this:

"Illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the protection of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be "*obsta principiis.*"

IV. The objections to the information in this case, and to the proceedings upon it here presented, were sufficiently raised in the court below by the motion in arrest of judgment and the motion to quash.

In many of the cases heretofore cited, these objections were taken by such motions, and were held to be well taken.

And this Court so hold in *Rosen vs. U. S. supra* as well as in other cases.

1. The motion in arrest is very full and elaborate in stating the numerous points under the constitutional provisions into which the argument for the respondent was subdivided. This was unnecessary. It would have been quite enough, if it had contained only its fourth and fifth clauses, (*Record, p. 7*).

"Said Edward Hodgson, on said trial as appears by the record, was convicted of two infamous crimes without due process of law."

"Said Edward Hodgson, on said trial was denied by the State the equal protection of the laws."

The learned Judge who delivered the opinion in the record, intimates that the objection to the information might be regarded as cured by the verdict, as the court would presume that those facts not alleged that were necessary to a conviction might have been found by the jury. (*Record, p. 10.*) If the information was totally void as being in violation of the constitution of the United States, as this Court has repeatedly held, it is not easy to perceive what facts could have been found by the jury that would obviate that difficulty.

Nor was it ever the law that any defect of substance in an indictment was cured by verdict.

2. The motion to quash, also, sufficiently raises the questions though its language is more general. The report of the case in 66 Vt. Rep. shows that in the Supreme Court of Vermont such was the construction given by the counsel to its language, and such the right that was claimed under it.

Whenever the record shows that a man has been convicted without due process of law, and he claims the protection of the constitution and makes his claim understood by the court, and it is overruled by the court on its merits, he is not to be treated as having waived his rights because his language or that of his counsel is not precise, and "certain to a certain intent in every particular."

Indeed the true rule is that constitutional rights such as are here involved cannot be waived by an accused person, and that though he may have expressly waived, or omitted to assert them, and still before the final judgment is pronounced

claims the protection of the constitution and it is denied him, while the record shows that he was entitled to it, the judgment will be reversed by this Court on a writ of error.

"That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure on trial and in custody to object to unauthorized methods." Per Mr. Justice Harlan in *Hapt v. Utah, 110 U. S. Rep. 579.*

V. The federal questions in the case are sufficiently brought before this Court, by the assignments of error on which the writ of error was granted, (*Record, p. 22*), and by the further assigments in this Court. (*Record p. 26*).

The Supreme Court of Vermont intimates that the motion in arrest in that court might have been overruled because not filed in the court below. But they did not so decide, and expressly declined to do so, stating that if they did, they should remand the case to the County Court so that the motion could be filed there. And proceeded to dispose of the motion on its merits. The case is therefore not within the rule that excludes the jurisdiction of this court when the judgment appealed from was given on two grounds, either sufficient to support it, and one of which was non-federal.

But even if it had been held by that court that the motion was too late, the plaintiff in error would not have been deprived of his right to invoke the jurisdiction of this Court. It will be seen from the record that there was no judgment on the verdict and no sentence in the trial court, but the judgment was respited and sentence stayed. And that the judgment was rendered and the sentence imposed by the Supreme Court. In criminal cases where exceptions are allowed, the statutes of Vermont authorize that the judgment and sentence be stayed, to await the decision of the Supreme Court. And if the exceptions are overruled, that court alone has then the power to render judgment and pass sentence. (*Rev. Laws, Sec. 1699–*

*1700.*) How then can it be said that its jurisdiction was for that purpose appellate, or that the motion to arrest the judgment that it alone had then jurisdiction to render and did render, should have been made in a former court where judgment was not ren-rendered, and could not legally be rendered. Since the Supreme Court had the sole jurisdiction to render the judgment, they had the sole jurisdiction to arrest it. A motion in arrest of judgment is never too late in a criminal case, if made before the judgment is rendered and sentence pronounced, and in the court where that takes place.

*1 Bishop C. P. (Ed. 1866) sec. 850-852.*

And especially must this be true where the ground of the motion is that the judgment is void under the constitution of the United States.

W. H. BLISS, and
E. J. PHELPS,
Counsel for the plaintiff in error.

Brief of Def't in Error for U. S.

Filed Dec. 30, 1896.

# SUPREME COURT OF THE UNITED STATES.

Sup. Court, U.
D.
DEC 30 1896
JAMES H. McKENNEY,
CLE

OCTOBER TERM, 1896.

No. 177.

EDWARD HODGSON, PLAINTIFF IN ERROR,

*vs.*

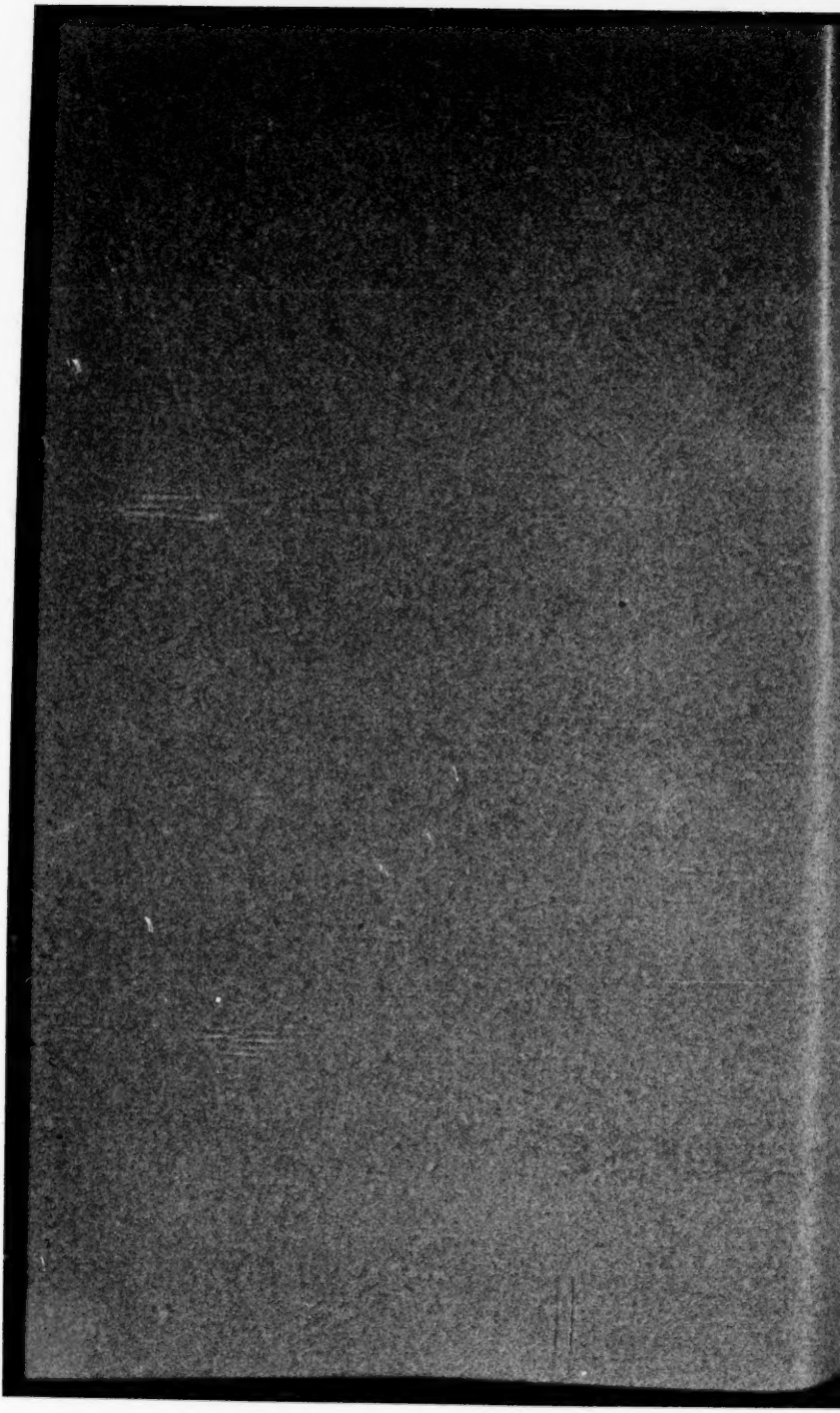
THE STATE OF VERMONT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

BRIEF FOR DEFENDANT IN ERROR.

BY FRANK L. FISH AND CHARLES A. PROUTY.

(15,700.)



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I.

The first ten Amendments to the Constitution of the United States apply to the National Government alone and are not inhibitions upon the States. In Thorington *vs.* Montgomery, 147 U. S., 691, this court decided that, "The 5th amendment operates exclusively in restriction of Federal power, and has no application to the States." In Davis *vs.* Texas, 139 U. S., 651, this court said,—"The Fifth and Sixth Amendments of the Constitution of the United States * * * are restrictive of the powers of the Federal Government and not restraints upon the States." Again in McElvaine *vs.* Brush, 142 U. S. 155, it was held that, "The first ten articles of amendment were not intended to limit the powers of the States in respect of their own people, but to operate on the Federal Government only." In O'Neil *vs.* Vermont, 144 U. S. 323, it was decided that "as a Federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the States." In Pierson *vs.* Yewdall, 95 U. S. 294, it was decided that Article 7 of the Amendments, relating to trials by jury, applies only to the courts of the United States. This subject received elaborate attention in Ex Parte Spies, 123 U. S. 131, where Mr. Chief Justice Waite, speaking for the court declared, "That the first ten articles of amendment were not intended to limit the powers of the State Governments in respect to their own people, but to operate on the National Government alone, was decided more than half a century ago, and that decision has been steadily adhered to since." In support of this posi-

tion the following cases are cited in the opinion,—Barron *vs.* Baltimore, 32 U. S., 7 Pet 243, Livingston *vs.* Moore, Id. 469; Fox *vs.* Ohio, 46 U. S., 5 How. 410; Smith *vs.* Maryland, 59 U. S., 18 How. 71; Withers *vs.* Buckley, 61 U. S., 20 How. 84; Pervear *vs.* Commonwealth, 72 U. S., 5 Wall. 475; Twitchell *vs.* Commonwealth, 74 U. S., 7 Wall. 321; The Justices *vs.* Murry, 76 U. S., 9 Wall. 274; Edwards *vs.* Elliot, 88 U.S., 21 Wall. 532; Walker *vs.* Sauvinet, 92 U. S. 90; U. S. *vs.* Cruikshank, Id. 542; Pearson *vs.* Yewdall, *supra*; Davidson *vs.* New Orleans, 96 U. S. 97; Kelly *vs.* Pittsburg, 104 U. S. 79; Presser *vs.* Illinois, 116 U. S. 252.

II.

If these Amendments are binding upon the States, the punishment is not cruel and unusual in the case under consideration. The only punishment authorized is fine and imprisonment in the house of correction. For a first offense, the fine may be from five to one hundred dollars, and imprisonment for not more than thirty days, in the discretion of the court; for the second offense, the fine may be from ten to two hundred dollars, and imprisonment for not less than one month and not more than one year. The maximum penalty that could have been imposed in the case for the two offenses proved is a fine of three hundred dollars, and imprisonment for one year and one month. The actual fine imposed was one hundred dollars, and the term of imprisonment sixty days. The penalty of which the plaintiff in error complains is not more severe than that prescribed by the United States in the statute for the prevention of the traffic in intoxicating liquor in the Indian Territory. This has been in force for over half a century, has been repeatedly enforced in the Federal courts, and has thus far escaped the attacks of those who would claim it to be unconstitutional because cruel and excessive punishment is provided. This statute is as follows,—"Sec. 2139, U. S. Statutes, (as amended by an act, approved July 23, 1892, c. 234, 27 Stat. 260.) No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretence, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquors of any kind into the Indian country, shall be punished by imprisonment for not more than two years, or by fine of not more than three hundred dollars for each offense." In the license case of Purvear *vs.* Massachusetts, 72 U. S., 5 Wall. 475, which was reviewed in this court, Mr. Chief Justice Chase, delivering the opinion, said,—"But it appears in the record that the fine and punishment in the case before us was $50 and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted of prohibiting

under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps all, of the States. It is wholly within the discretion of State Legislatures. We see nothing in the record, nor has anything been read to us from the statutes of the State which warrants us in saying that the laws of Massachusetts having application to this case are in conflict with the Constitution of the United States." The decision of the Supreme Court of Vermont in the O'Neil case, *supra*, is direct authority for this case. The court said in its opinion in that case—"The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense for which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed *a great many such offenses*. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offense, the constitutional question might be urged; but here the unreasonableness is only in the number of the offenses which the respondent has committed." State *vs.* O'Neil, 58 Vt. 140. This decision received the sanction of this court when it reviewed the case in question. The language of our court in comparing the case at bar with the O'Neil case, with reference to the dissenting opinion of Mr. Justice Field, is pertinent. "In the O'Neil case the imprisonment proper was one month, but the number of offenses was so large that the fines amounted to a large sum and, if unpaid, the imprisonment would be over fifty-four years for him to work out the fine in the house of correction. It was only the aggregation of imprisonment that Justice Field complained of as cruel and unusual. *Non constat* that *he* would regard the extreme limit of punishment in this case as cruel and unusual. Considering the magnitude of the evil sought to be restrained, the fact that the only motive for committing the offense is cupidity, or desire for pecuniary gain to be acquired by taking advantage of the weakness of fellow citizens, weighed down if not overborne by pernicious habit, we do not think the punishment cruel and unusual. The punishment is graded and made to depend upon whether the conviction is the first or second. It is of such a nature as tends to take away the inducement to the crime. It is not unreasonable in the length of imprisonment nor amount of fine that can be imposed for a single offense." It has been decided by this court that an increase of punishment on conviction of a second offense, by reason of the commission of the first offense, does not make the punishment cruel and unusual. Moore *vs.* Missouri, 159 U. S. 670.

III.

The information is not obnoxious to the Fourteenth Amendment as not being due process of law. The question presented by the assignment of errors is one of procedure and it arises under the following sections of the Revised Laws of Vermont: "Sec. 3859. Complaints for any offense against section 3802 shall be substantially in the following form: State of Vermont county, ss. To A. B., justice of the peace within and for the county of , comes C. D., grand juror of the town of , in said county, and complains that E. F., of on the day of A. D. , at , did at divers times sell, furnish, or give away, (as the case may be,) intoxicating liquor without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." Sec. 3860. Under the foregoing complaint, every distinct act of selling, furnishing or giving away may be proved and the court shall impose a fine for each offense, or if the number exceeds five and not ten, the respondent shall be adjudged a common seller and be subjected to the penalties provided in section 3810." The section fixing the penalty intended to be enforced by virtue of the foregoing provisions is as follows,—"Sec. 3802. If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps or possesses with intent to sell, furnish or give away intoxicating liquor or cider, in violation of law, he shall forfeit for each offense to the State, upon the first conviction, not less than five nor more than one hundred dollars, and may be imprisoned in the discretion of the court not more than thirty days; upon the second and each subsequent conviction, not less than ten nor more than two hundred dollars for each offense, and shall also be imprisoned not less than one month nor more than one year." The following other sections relate to the Vermont prohibitory law:

"Sec. 3800. No person shall except as otherwise specially provided manufacture, sell, furnish or give away, by himself, clerk, servant or agent, spirituous or intoxicating liquor, or malt liquors or lager beer; and the phrase "intoxicating liquors" where it occurs in this chapter shall be held to include such liquors and beer. The word 'furnish' where it occurs in this chapter shall apply to cases where a person knowingly brings into or transports within the State for another person intoxicating liquor intended to be sold or disposed of contrary to law, or to be divided among or distributed to others. The words 'give away' where they occur in this chapter shall not apply to the giving of intoxicating liquor at private dwellings, or their dependencies, unless given to an habitual drunkard, or unless such dwelling or its dependencies become a place of public resort.

"But no person shall furnish or give away intoxicating liquor at an assemblage of persons gathered to erect a building or frame of a building, or to remove a building or at a public gathering for amusement.

"Nothing in this chapter shall prevent the manufacture, sale and

use of wine for commemoration of the Lord's supper, nor the manufacture, sale and use of cider, or, for medical purposes only, of wine made in the State from grapes or other fruits the growth of the State and which is without the admixture of alcohol or spirituous liquor, nor the manufacture by any one for his own use of fermented liquor.

"But no person shall sell or furnish cider or fermented liquor at or in a victualing house, tavern, grocery, shop, cellar, or other place of public resort, or at any place to an habutual drunkard.

"Sec. 3803. Justices shall have concurrent jurisdiction with the county court in prosecutions under the preceeding section, and the same may be tried upon the complaint of a grand juror of a town, or upon the information of the State's attorney before the county court.

"Sec. 3804. In prosecutions under said section (3802) the prosecuting officer shall allege in the complaint, information, or indictment, known prior convictions under said section to the number of two, and upon trial shall make proof of the same, and in case of a wilful failure so to do shall be liable to the provisions of and the penalty prescribed by section 3852.

"Sec. 3805. In such prosecutions the respondent, if he pleads guilty, shall state in his plea the number of offenses of which he pleads guilty; and the prosecuting officer, under the direction of the court, may accept the plea for such number of offenses, or may put the respondent on trial, in his discretion; and in such prosecutions *no more than one count shall be required*, and no costs shall be allowed to the State's attorney, or taxed against the respondent, for additional counts.

"Sec. 3806. When a person is prosecuted, either by complaint, indictment, or information, for selling, furnishing, or giving away intoxicating liquor, if such person appears before the court wherein such prosecution is pending and pleads guilty to the offenses charged, and judgment is rendered thereon for the penalty, such offenses shall be held to have been committed on the days specifically set forth in such complaint, indictment, or information, unless the respondent, at the time of pleading guilty, specifies some other days on which offenses were committed, in which case an entry thereof shall be made upon such complaint, indictment or information, and become part of the record.

"Sec. 3807. The judgment rendered in such proceedings on plea of guilty shall not be a bar to subsequent prosecutions for other offenses than the ones specified in the complaint, indictment or information, or by the respondent, whether committed on the same day or before or after it. And if on subsequent proceedings against the same person for like selling, furnishing or giving away of intoxicating liquor it appears that such person had been guilty thereof at other times than those specified in the former proceedings, he may be proceeded against therefor as though such other offenses had been committed subsequent to such former judgment.

"Sec. 3847. Cases arising under this chapter shall take precedence of other trials in the court in which they are pending, except

those in criminal cases where the respondents are under arrest; and neither the court nor the prosecuting officer shall enter a *nolle prosequi*, or grant a continuance in a case arising under this chapter, either before or after the verdict, except where in their opinion the purposes of justice require it.

"Sec. 3848. In prosecutions for offenses against the provisions of this chapter where a prior conviction is relied upon to increase the sentence, it shall be set forth in the complaint, information or indictment, and it shall be sufficient in such case to set forth in substance the fact of such prior conviction, the offense for which the conviction was had, and the time and place at which, and the court by and before which it was had.

"Sec. 3850. In trials for offenses against this chapter the respondent may have a trial by jury and upon such trial the jury on conviction shall return a special verdict in cases where it is necessary to enable the court to pass the proper sentence.

"No. 37, Laws of 1886. Section 1. In prosecutions for offenses against any of the provisions of Chapter 169 of the Revised Laws (relating to intoxicating liquors,) where a specification shall be required, it shall be sufficient to specify the offenses with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and when the specification sets forth the sale, furnishing, or giving away to any person or persons unknown, the witnesses produced may be inquired of as to such transactions with any person, whether named in the specification or not, and as the name of any such person may be disclosed by the evidence it may be inserted in or added to the specification, upon such terms as to postponement of a trial, for this cause as the court shall think reasonable."

Nearly all of the sections of the Revised Laws quoted were enacted in 1852, when Vermont adopted the prohibitory law. Sections 3859 and 3860 were enacted at that time and have not been amended since. In the administration of the law as first enacted some prosecuting officers made use of as many as a hundred counts for selling, as many for furnishing and a like number for giving away, in the same indictment. But the court discountenanced this kind of proceeding, as it enhanced the costs and gave the respondent no additional information of the nature of the accusation except in point of date of commission of the offense. State *vs.* Parker, 26 Vt. 357; (1854) and State *vs.* Freeman, 27 Vt. 523, (1855). Of these cases the Vermont Supreme Court in State *vs.* Brown, 36 Vt. 561, said:

"Those cases were under the original act, in which the same form is given, but which does not contain the provision as to only one count being necessary. In the case of Parker there was but one count, and that was for selling and furnishing, under which it was held that several offenses might be proved; and though the point was not raised, it seems unquestionable that acts of giving away, as well as acts of sale, might have been proved under that count. In State vs. Freeman, the court, by implication at least, discoun-

tenanced the attempt of the State's Attorney to observe technical rules by making counts applicable to the different modes of committing the offense prohibited in Section 9, (3802), instead of using a single count, including 'selling, furnishing and giving away,' using the very language adopted in this complaint, and embracing it in quotation marks, as being the language proper, *in todidem verbis*, to be used, under the statutory provisions."

In 1858 the legislature enacted into law that which had become already the practice of the courts, by adopting the following: "In such prosecutions no more than one count shall be required, and no costs shall be allowed to any State's Attorney, or taxed against any respondent, for any additional counts in such prosecutions."—Sec. 2, Laws of 1858.

It had been held by the courts of Vermont prior to the passage of this act that respondents were entitled to specifications of the offenses relied upon. In State *vs.* Freeman, *supra*, the court said: "It was held by this court in State *vs.* Parker, and we think correctly, that under one complaint the prosecutor might show any number of offenses, being bound, if required, to give the respondent before trial, a specification of the nature of the offenses which he would attempt to prove." In State *vs.* Rowe, 43 Vt. 265, the court said: "It has been ruled in this state that in this class of cases the accused is entitled to a specification of the offenses charged in this form of complaint. It would seem that this ruling was made with the view of satisfying the provision of the 10th article of the bill of rights of our state constitution, which gives the accused, in all prosecutions for criminal offenses, a right to *demand the cause and nature of his accusation*. The respondent had a right to rely upon the specification in the record, as notice of the offenses, in proof of which testimony would be offered, and to claim that the prosecutor should be confined in his proof, to the offenses specified." In State *vs.* Wooley, 59 Vt. 357, a case like this one, the prosecutor specified the names of the witnesses, and further that "there are various other witnesses unknown to the State's attorney at present." Of this case the court said: "It is the general form of charging the offense, prescribed by the statute, which gives the right to a specification. If the form of the indictment required as specific a statement of the offense as is required by the common law rules of criminal pleading no further specification of the offense would be legally required. Hence, the respondent is not legally entitled to a more minute detail of statement of the facts necessary to constitute the offense in the indictment and specification, when taken together, than he would be entitled to in an indictment at common law. In an indictment at common law a good sale, furnishing, or giving away could be charged as made to a person unknown to the grand jurors, and for that reason not named. In legal effect this is the charge, in this respect, by the specifications furnished."

In State *vs.* Brown, *supra* (1864), it was held that this form of complaint was not bad for duplicity. In disposing of this objection,

the court said: "It seems clear that only a single count was necessary in order to charge, and admit proof of, any number of offenses, whether of selling or furnishing, or giving away,—that under such single count offenses by either or all of the three modes of violating the 9th section (3802 R. L.), might be proved. The form given in section 28 (3859 R. L.), implies, and is conformable to this view. If no form had been given, we think the other provisions would have resulted in the same thing. The changing of the word "or" into "and,"—the disjunctive or alternative into the conjunctive—is required not only to answer the requirements of the other provisions, but is in conformity with the general rules of pleading, when it is permitted or required to embrace in the same count the averment of several distinct acts, each constituting a crime of the same character and penalty, and which consisted in the transaction, intended to be, and is in fact covered by one or the other of the alleged acts. But the objection is, not that the word is thus changed—but that the count embraces two separate offenses; and it is insisted that it is not warrantable to join the offense by sale, and that by giving away in the same count. Whatever we might think of this objection, if it stood upon the rules of the common law, we are quite well satisfied that the State's Attorney has acted in strict conformity with the provisions and intent of the statute, in adopting this form of count."

It was decided in Vermont, under the license law that was in force before 1852, that it was unnecessary to aver the name of the person to whom liquor was sold, and that decision is conclusive in Vermont in cases under the prohibitory law as well. In State *vs.* Munger, 15 Vt. 290, the Supreme Court said: "It is said that the indictment is bad, because it is not averred to whom the liquor was sold, or that the person or persons are unknown. It is of no importance that the indictment should contain such an averment. The offence complained of works no injury upon the individual rights of the person to whom the sale was made, and none are supposed to be violated."

The meaning of the words "at divers times," in indictments under Section 3859, was settled in State *vs.* Jones, 39 Vt. 370, (1867), where our court said: "It follows then that the words 'at divers times' means the commission of divers offenses. It would seem that it must mean this, or else letting in proof of a multiplicity of offenses would lead to the trial and conviction of the respondent for offenses for which he had not been indicted. The object, the purpose of these words, is to inform the court that the respondent is indicted for more than one offense, and to so notify the respondent that he may be prepared to meet proof of more than one offense. These words, omitted in this indictment, are the only words in the statute form that indicate to the respondent that more than one offence is charged, or that distinguish it in this respect from a common law indictment for a single offence. It is evident, therefore, that these words for this purpose, are matter of substance, and that without them or something equivalent, only one offence can be proved under a single count."

It was held in State *vs.* Whipple, 57 Vt. 637, that: "The exact

time is not material. It is sufficient if the offenses proved are not barred by the statute of limitations. The statute in relation to offenses of this character, R. L. 3859, regulates the mode of proceeding, and prescribes the form of complaint. And it further provides in S. 3860, that under an indictment, etc., in the form prescribed, every distinct act of selling, furnishing and giving away may be proved. One count only is requisite for any number of offenses. The information in this case is in the form and language prescribed by the statute, and under it the statute, in terms, says every distinct act may be proved. The language of the statute clearly covers all offenses within the statutory period. Each distinct act of selling constitutes an offense, and the time is wholly immaterial, except it must be within the time limited by the statute."

The Statute of Limitations having relation to this kind of offenses is as follows:

"Sec. 1712, R. L. Actions, complaints, informations or indictments for a crime or misdemeanor, other than theft, robbery, burglary, forgery, arson and murder, shall be commenced within three years after the commission of the offence, and not after."

It has been held for a long time by the courts of Vermont that the subject matter of the liquor law comes under section 5 of the Bill of Rights of the Constitution of the State, which is as follows: "That the people of this State by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same." In State *vs.* Freeman, before referred to, our court, by Chief Judge Isaac F. Redfield, said: "The only question, then would be, whether the provision is constitutional. Of this we entertain no doubt. The only argument upon which it is claimed to be unconstitutional, is, that it conflicts with the tenth article of the Bill of Rights. But the court have now, more than once, held, that the provisions of that article have no reference to trials for minor offenses, affecting the police of the State merely, the 'exclusive control' and regulation of which is by the fifth article of the Bill of Rights, secured exclusively to the legislature of the State, and offenses effecting which, since the first establishment of our government, have been tried before justices of the peace, where there is no indictment, and properly speaking no traverse jury, such as is required by the tenth article, for conviction of crimes, there called 'criminal offenses,' and more commonly high crimes."

Respondents have had no cause to complain that they could not plead a former judgment in bar to a prosecution for a similar offense, for parol evidence is admissible to the extent of protecting them in their rights. In Chase *vs.* School District, 47 Vt. 524, the Vermont court by Poland, J., said: "It has long been settled, that parol proof is admissible to prove or disprove the indentity in litigation with that of the former adjudication." In State *vs.* Brown, 49 Vt. 537, it was held that "When no specification is required nor furnished, the offenses for which the respondent was tried can only be shown by parol; and a prior judgment will be conclusive of * * such offenses as were therein put in issue by the evidence."

The foregoing statutes and the decisions of the highest court of Vermont in relation thereto, constitute essentially the law applicable to the case under discussion. This is the law mainly under which "the trials of these causes have gone on for nearly forty years without special complaint, inconvenience or hardship." It is to be noted that the law complained of as unconstitutional, as first enacted, had been in force for six years before the adoption of the 14th Amendment, and as amended, had been in force for ten years before the adoption of the amendment. The construction that the State now insists applies to the statute in this case, had been established by our supreme court prior to the adoption of the amendment. It is insisted that the procedure authorized had become due process of law before the adoption of amendment, in the State of Vermont. It was, therefore, not affected by the amendment. I. Bishop's New Crim. Pro. Sec. 100, 2, Hurtado *vs.* California, 110 U. S. 516. Missouri *vs.* Lewis, 101 U. S. 22. If affected by the amendment, then it is insisted that the process adopted in the prosecution of these cases in enforcement of the law in the courts of the State for the past forty years has made the process that which is due to those who are charged with the violation of the law.

In this connection it is important to consider what is due process of law. Due process of law is its regular administration through courts of justice by a timely and regular course of proceeding to judgment and execution. As a rule it includes parties, regular pleadings and a trial according to a settled course of proceedings.

Den *vs.* Hoboken, 59 U. S., 18 How. 82; Rees *vs.* City of Watertown, 86 U. S., 19 Wall., 107; Barker *vs.* Kelly, 11 Minn. 480; Dwight *vs.* Williams, 4 McLean, 586; Westervelt *vs.* Grugg, 12 N. Y. 202; Rowen *vs.* State, 30 Wis. 129; Huber *vs.* Riely, 53 Pa. St., 112; State *vs.* Becht, 23 Minn. 412. It does not necessarily require trial by jury. Summary proceedings are included. Walker *vs.* Sauvinet, 92 U. S., 2 Otto, 90; U. S. *vs.* Ferrina, 54 U. S., 13 How. 40; Martin *vs.* Mott, 25 U. S., 12 Wheat, 19.

"Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Giozza *vs.* Tiernan, 148 U. S. 659; See also Leeper *vs.* Texas, 139 U. S. 462. "Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient for the purposes of this case, to say that the legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government, with respect to kindred matters, that is by process or proceedings adapted to the nature of the case." Mr. Justice Field in Dent *vs.* State of W. Virginia, 129 U. S. 114. In Hurtado *vs.* California, 110 U. S. 516, this court held, "that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement

is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." "Due process of law is process due according to the law of the land. This process in States is regulated by the law of the State." Mr. Chief Justice Waite in Walker *vs.* Sauvinet, *supra.*

If it is insisted that the legislature and the courts of Vermont have not the authority to prescribe the procedure in question, and by the adoption of and practice under the same for a long period of time to make it *due process of law*, it is answered that, regardless of the statute authorizing the information, it is in substantial conformity with the canons of good pleading, and describes one offense at least, under 3802 R. L., with all the particularity required by the common law.

(*a.*) Both time and place are formally alleged.

(*b.*) It was proper to allege that the respondent "did sell, furnish, and give away," using all the words in the statute in a single count. This is in compliance with a familiar rule of criminal law which is defined in Bishop on Criminal Procedure 1, Sec. 436, as follows:—"It is common for a statute to declare, that, if a person does this, or this, he shall be punished in a way pointed out. Now, if in a single transaction, he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunctive *and* where the statute has "or" and it will not be double, and it will be established at the trial by proof of any one of them. Thus, where the allegation was that the defendant sold spirituous liquors, to wit: rum, brandy, whiskey, and gin in less quantities than one quart, without license, the court overruled the objection that four offenses were thereby charged, saying: 'The selling of any of the liquors named would be an offense, but there is no more reason why an offender should be indicted separately for each, than there would be to charge a thief, who had stolen a suit of clothes, in separate counts for the coat, waistcoat, etc.' The State *vs.* Whitted, 3 Ala., 102. This court has recently decided that an indictment under U. S. Rev. Stat. sec. 5511, is not insufficient as charging three distinct offenses in a single count, which charges that the accused unlawfully carried way, and aided in carrying away, and advised and procured the carrying away, a ballot box and secreted the ballots, the accused not being taken by surprise, or in doubt as to the offense charged. Connors *vs.* U. S., 158 U. S. 408. This case arose upon a motion in arrest. In support of this proposition are also Rawson *vs.* State, 19 Conn. 292; Commonwealth *vs.* Foss, 14 Gray 50; Conley *vs.* The State, 5 W. Va. 522; Teft *vs.* Commonwealth, 8 Leigh, 721; State *vs.* Finan, 10 Iowa 19; State *vs.* Beilby, 21 Wis. 206. It was by statute in Massachusetts made

punishable "if any person shall sell, or offer for sale, or shall advertise, or caused to be advertised for sale" any lottery ticket, etc., and a count was held not to be double which charged that the defendant "did unlawfully offer for sale and did unlawfully sell." Commonwealth *vs.* Eaton, 15 Pick., 273. The language of our court in case at bar is convincing upon this point. "This contention assumes that a sale of intoxicating liquor, under the statute, is a different offense from furnishing it or giving it away. But this is not true. The thing prohibited consists in providing intoxicating liquor contrary to law. It may be done in any one of the three ways specified. A sale, a furnishing, a giving away of intoxicating liquor, each, is the prohibited provision of it aimed to be suppressed by the statute. The quality and magnitude of the offense is the same, in whichever of the three ways it is committed. Every transaction violating this law comes within one of these terms. The prosecutor is confined to a single count. He must frame it to meet the varying phases of his proof. Whether the complaint charges the sale, furnishing, and giving away conjunctively, if a sale is shown, the other words are surplusage, and *vice versa*."

(*c.*) Under our form of statute it is widely held that it is sufficient in describing the liquor to say "intoxicating liquor," and no more. Commonwealth *vs.* Conant, 6 Gray 482; Commonwealth *vs.* Ryan, 6 Gray 137; The State *vs.* Blaisdell, 33 N. H. 388; Plunkett *vs.* The State, 69 Ind. 68; Buell *vs.* The State, 72 Ind. 523.

(*d.*) It is unnecessary to name the person or persons to whom sales are made. Upon this point Mr. Bishop says: "Undoubtedly indentification may be made sufficiently clear to satisfy the demands of legal principles without the name." Bish. Cr. Pro. s. 1047. In support of this proposition are the following authorities: State *vs.* Munger, 15 Vt. 290; State *vs.* Spain, 29 Mo. 415; Hulstead *vs.* Commonwealth, 5 Leigh 724; The State *vs.* Parnell, 16 Ark. 506; People *vs.* Adams, 17 Wend. 475; Canady *vs.* People, 17 Ill. 158; McCuen *vs.* The State, 19 Ark. 630; Green *vs.* People, 21 Ill. 125; The State *vs.* Ladd, 15 Mo. 430; The State *vs.* Muse, Dev & Bat. 319; The State *vs.* Beilby, *supra*; The State *vs.* Gummer, 22 Wis. 441; Commonwealth *vs.* Dove, 2 Va. Cas. 26; Riley *vs.* The State, 43 Miss. 397; Rice *vs.* The People, 38 Ill. 435; The State *vs.* Hickerson, 3 Heisk. 375; The State *vs.* Staley, 3 Lea. 565; The State *vs.* Rogers, 39 Mo. 431; The State *vs.* Kuhn, 24 La. An. 474; The State *vs.* Schweiter, 27 Kan. 499; The State *vs.* Jaques, 68 Mo. 260; State *vs.* Looker, 54 Kan. 227; State *vs* Broughner, (S. D.) 59 N. W. 736.

(*e.*) The statute does not make the offense or punishment vary with the quantity of liquor sold, furnished, or given away, and it therefore need not be alleged. Bishop on Stat. Crimes s. 1039; Plunkett *vs.* The State, 69 Ind. 68; White *vs.* The State, 11 Texas Ap. 476.

(*f.*) The doctrine as to ownership does not apply to cases of this character. It is wholly immaterial who the owner is of the liquor

sold. It is no part of the description of the offense to allege the ownership of such liquor, and the penalty is the same whoever the liquor belonged to. The doctrine of ownership applies only to such offenses as consist wholly or in part in a wrong done to the real or personal property or possession of one who is injured thereby; as for illustration, in cases of malicious mischief, larceny, false pretenses, and in such offenses to or upon the reality as arson and burglary. 1 Bish on Crim. Pro. s. 583, 584.

(*g.*) The general doctrine and practice in cases of this kind do not require an averment of price. Bishop on Stat. Crimes s. 1040; Bishop on Crim. Pro. 1514; Clare *vs.* The State, 5 Iowa 509; The State *vs.* Finan, 10 Iowa 19; The State *vs.* Miller, 24 Mo. 431; The State *vs.* Downer, 21 Wis. 277.

(*h.*) It being unnecessary to allege the price, it is for the same reason unnecessary to state the name of the person who paid the same. The cases cited under the last sub-division of the brief are authority upon this point.

(*i.*) It was unnecessary to allege whether the respondent acted as principal, clerk, servant, or agent. The gist of the offense is the selling, furnishing, or giving away. The respondent would be equally punishable in any case, and it would not aid him in making his defense if the capacity in which he acted when he violated the law was set forth. The words of the statute, "by himself, clerk, servant or agent," are not descriptive of the offense, and their omission, therefore, does not invalidate the form. State *vs.* Finan, *supra*; Commonwealth *vs.* Woods, 165 Mass. 146.

(*j.*) The authority to sell is properly negatived and the information concludes in the usual form.

The words of the statute were followed to such an extent that the court could see on what statute the complaint was drawn; and as many of the substantial words of the statute were set out as were needed to show a *prima facie* violation of the law, and this is all that the canons of good pleading require. Bishop on Crim. Pro. 1614; Comonwealth *vs.* Trickey, 13 Allen, 559; Picket *vs.* The State, 22 Ohio St. 405; People *vs.* Clements, 26 N. Y. 193; Commonwealth *vs.* Smith, 116 Mass. 40; The State *vs.* Walton, 62 Me. 106; Commonwealth *vs.* Castles, 9 Gray, 123; Surratt *vs.* The State, 45 Miss. 601; People *vs.* Nugent, 4 Cal. 341. Mr. Chitty, in 1 Chitty Pl. 213, said: "The observations of Lord Chief Justice DeGray on the structure of an indictment are very forcible and equally applicable to the pleadings in civil actions; the charge must contain such a description of the injury or crime that the defendant may know what injury or crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty, upon the premises delivered to them, and that the court may see such a definite injury or crime that they may apply the remedy or the punishment which the law prescribes. The certainty essential to the charge consists of two parts, the *matter* to be charged and the *manner* of charging it. As to the matter to be charged, whatever cir-

cumstances are necessary to constitute the crime imputed, must be set out and all beyond are surplusage. Secondly, as to the *manner* of making the averment. There are cases where a *direct* and positive averment is necessary to be made in *specific* terms; as where the law has affixed and appropriated technical terms to describe a crime, as in murder, burglary and others. It is likewise true that in all cases those *facts* which are *descriptive* of the *crime* must be introduced upon the record by *averments* in opposition to argument and *inference*." The comments of the Chief Judge of Vermont in the case at bar upon the application of the foregoing principles of pleading to this case are apt and forcible. "The offense created by the statute is the provision of intoxicating liquors without authority of law, either by a sale, furnishing or giving away. There are no circumstances necessary to be set out to constitute either of these acts an offense. The terms of the statute as clearly import the prohibited offense as any terms can. The offense is neither heightened nor lessened by, nor dependent upon, the kind or amount of intoxicating liquor sold, nor upon the person to whom the sale, furnishing, or giving away is made, nor upon the amount of money received, nor upon whether made by the respondent or by some one for him. None of these particulars need be set forth to notify the respondent of the offenses with which he is charged, and called upon to answer, not to apprise the jury of what they are to convict or acquit him, nor to apprise the court of the sentence which it should impose. The prescribed form covers the offense in the exact and easily understood language which creates it. This is sufficient. State *vs.* Daley, 41 Vt. 564; State *vs.* Cook, 38 Vt. 437; State *vs.* Jones, 33 Vt. 443; State *vs.* Matthews, 42 Vt. 542; State *vs.* Clark, 44 Vt. 636; State *vs.* Benjamin, 49 Vt. 101; State *vs.* Higgins, 53 Vt. 198; State *vs.* Miller, 60 Vt. 90; State *vs.* Campbell and note, 94 Am. Dec. 251.

"It is also contended that the particulars of the kind of liquor, price, and name of the person to whom sold, should be set forth in the information, both to apprise the defendant of the evidence he has to meet, and to have the record protect him from a second conviction for the same offense. It is never necessary for the state to disclose what is merely its proof of the commission of the offense charged in the information. If the record does not itself identify the offense or offenses for which conviction has been had, on the trial of a subsequent prosecution, such identification may be made by parol testimony. If these particulars were set out in the information, resort might have to be had to parol proof to identify the offense for which conviction was had. It might occur that the same respondent made more than one sale of the same kind and quantity of liquor, to the same person, at the same price, at the same place and on the same day. Besides by the common law it always has been held that the prosecutor need not set forth the name of the person, when unknown. Therefore by the common law the name is not indispensable. The prescribed form answers every essential requirement of the common law in regard to informations or indictments."

While it is true that the information alleges at least one offense with the definiteness required by the common law, the prosecution does not rely wholly upon common law rules to sustain the same, but is aided by a statute prescribing the procedure. If this statute is in violation of any of the rules of the common law, it was at least within the province of the legislature to enact it. Section 689 of the Revised Laws of Vermont provides that: "So much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or laws, shall be the law in this state, and courts are to take notice thereof, and govern themselves accordingly." "By this statute the common law is not in force, in charging a statutory crime created in clear, definite terms, with a prescribed form for charging it in the terms of the statute. It is sufficient in such a case to follow the prescribed form." Chief Judge Ross in the case at bar. Legislatures have repeatedly enacted laws that authorize forms of complaint that lack the fullness of common law forms, and such laws have been widely sustained by the courts. This right has been distinctly recognized by this court in many cases. It was held in Ogden *vs.* Saunders, 12 Wheat. 213, that a state is "in the exercise of its legitimate powers when it is regulating the remedy and the mode of proceeding in its courts." It was held in the same case that: "In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers." In the matter of Louis Reggell, 114 U. S. 642, this court decided that each state has the right to prescribe the form of pleading and process to be observed in her courts, in both civil and criminal cases, subject only to those provisions of the national constitution designed for the protection of life, liberty and property in all the states of the union. One of the latest authorities upon this point of this court is to be found in Fong Yue Ting *vs.* United States, 149 U. S. 698. The question involved was whether the statute for deportation of the Chinese was constitutional, because it changed the burden of proof and prescribed what evidence should be received. Mr. Justice Gray, in delivering the opinion of the court, said: "The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act, is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government." In Holmes *vs.* Hunt, 122 Mass. 505, the court said: "The forms of procedure and the rules of evidence are within the control of the legislature." Rowen *vs.* The State, 30 Wis. 129, is a leading authority. A statute of Wisconsin provided that "in indictments or informations for murder or manslaughter it shall not be necessary to set forth the manner in which or means by which the death of the deceased was caused, but it shall be sufficient in any indictment or information for murder, to charge that the accused did wilfully, feloniously, and of his malice aforethought, kill and murder the deceased;

and in any indictment or information for manslaughter it shall be sufficient to charge that the accused did feloniously kill and slay the deceased." The following information drawn under this statute was held good: "I, C. K. Martin, district attorney for said county, hereby inform the court that on the 28th day of April, in the year one thousand eight hundred and seventy-one, at said county, James Rowan did wilfully, feloniously, and of his malice aforethought, kill and murder Charles McKenzie, against the peace and dignity of the State of Wisconsin.

"I, C. K. Martin, district attorney for said county, hereby inform the court that on the twenty-eighth day of April, in the year one thousand eight hundred and seventy-one, at said county, the said James Rowan did wilfully and feloniously kill and slay Charles McKenzie, against the peace and dignity of the State of Wisconsin." It was decided that this procedure was not in violation of the constitution of the State, which secures to the accused the right "to demand the nature and cause of the accusation against him." In Leeper *vs.* Texas, 139 U. S. 462, this court had under consideration an indictment reading as follows: "In the name and by the authority of the State of Texas, the grand jurors for the county of Coryell, State aforesaid, duly organized as such at the January Term, A. D. 1890, of the district court for said county, upon their oaths in said court present that Jim Leeper and Ed. Powell, on or about the 17th day of December, A. D. one thousand eight hundred and eighty-nine, in the county of Coryell and State of Texas, did then and there, with malice aforethought, kill and murder J. T. Mathis by then and there shooting him, the said J. T. Mathis, with a pistol, contrary to law and against the peace and dignity of the State." Defendant objected to the form of the indictment as not alleging all the material elements of the crime of murder, and charged that it was in contravention of the constitution of the State of Texas and of the constitution of the United States. To these objections this court said: "We find nothing special, partial or arbitrary or in violation of fundamental principles in the criminal laws of the State of Texas involved, and we perceive no ground for holding that the proceedings complained of, which were had in the ordinary administration of those laws, amounted to a denial by the State of due process of law to these parties, or of some right secured to them by the Constitution of the United States." The case of Bergman *vs.* Backer, 157 U. S. 655, is a stronger case. In this case it was held that a conviction under a statute making an indictment for murder sufficient which charges the defendant with wilfully, feloniously, and of his malice aforethought, killing and murdering a fellow creature, without charging the manner or means by which the crime was committed, violates no right or privilege of the accused. After reciting the statute in controversy, and the decisions thereunder, Mr. Justice Harlan, speaking for the court, said: "In view of these decisions, declaring the meaning and scope of the statutes under which the accused was prosecuted, it cannot be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due processs of law, as prescribed by the 14th

Amendment of the Constitution of the United States." See also Davis *vs.* Utah Ter. 151 U. S. 262.

From a consideration of all the foregoing cases the conclusion is inevitable that it is within strict legislative right to abridge the forms of the common law, even in cases of the highest crime known to the law, where the strictest certainty was formerly insisted upon, to the extent of stripping them of all allegations except such as the law has made affirmative elements of the offense. If then it is within the province of a legislature to form a complaint for murder that lacks the requirements of the common law, it would be absurd to insist that it has not a similar power over those offenses where the punishment is only by fine, or at the most, imprisonment for a brief period. And this "is not an ancient crime which has been, from time immemorial, clothed in special terms, which, by long use, have become the most apt and definite ones to describe the exact crime."

Conceding that the information sufficiently describes one offense under the law, (regarding the words "at divers times" as surplusage), the inquiry is, with the words added, does the information inform the accused of more than one offense. This question is to be determined by a consideration of the question as to whether sections 3859 and 3860, R. L., are a warranted exercise of the legislative powers of the State of Vermont. The test of whether a given form of complaint is sufficient or not is to be found in the answer to the inquiry of whether the defendant is enabled from it to make a preparation for a full and complete defense. This is the rule established by this court recently in the case of Rosen *vs.* United States, 161 U. S. 29, in which Mr. Justice Harlan, for the court, said: "A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and plead the judgment in bar of any further prosecution for the same crime." If he is thus enabled, then he is apprised of the nature and cause of his accusation. The information alleges that on a day named the defendant sold, furnished, and gave away at divers times, intoxicating liquor. It does not charge an "infinite crime." It does not charge a crime which a bill of particulars, giving the minutest details, cannot fully describe. As time is not an element of the offense and need not be proven as alleged, it follows that any offense described may be proven within the period limited by the statute of limitations. Omitting the words, "at divers times," we have a complaint charging in legal effect that the respondent at some time within the period of three years sold, furnished, or gave away, intoxicating liquor. If the complaint in this case is open to the charge that it describes an infinite crime by using the words "at divers times," it is insisted that the complaint with the words omitted is open to the same criticism, if such it can properly be called. For, there being a million or more minutes in the statutory limit, during which a liquor sellor might have plied his trade, and a minute being sufficient time in which to make a sale, it follows that the complaint describes all of the offenses that he has committed during this time, and he must prepare his defense for all these crimes when he is arraigned at

the bar of justice, not knowing what offense the prosecuting officer is going to attempt to prove. This startling result is not peculiar to the liquor law of Vermont. Suppose the defendent had been charged with unlawfully having in his possession with intent to offer for sale, a certain number of lottery tickets, in a certain lottery, for money not authorized by law, where the having in his possession of one ticket is a violation of the law, and he should be put upon trial for the crime. Is it not readily to be seen that he must prepare his defense to meet ten million charges, if so many tickets he had unlawfully in his possession during the statutory limit? Take a more common illustration. Suppose a clerk has been stealing money from his employer in five cent pieces daily during the whole statutory limit for larceny which is six years, and at the end of that time has been detected and charged in the usual form with having taken, stolen, and carried away the sum of one dollar, of the currency of the United States, in the denomination of five cent pieces, of the property of John Smith (his empioyer). Is there any doubt but what he might be convicted of any one of the crimes committed during the six years that the pilfering had been going on, under this complaint? If so, he then must prepare to defend against all the offenses committed, in so far as the complaint is descriptive of the same. It charges a multitude of offenses. And this form of complaint has never been challenged. To return to the complaint at bar, what does this form of allegation require of the defendant by way of defense? Any more than is required where the form omitted the words "at divers times?" Manifestly nothing, for under that form it was seen that he must be prepared to defend against all the offenses committed within the statutory limit. What then is the distinction between the two forms? Simply that under the one the prosecutor may be confined to the proof of one offense, and under the other he may prove all the offenses. The relief in both cases comes in the timely services of a specification.

In the language of the court, "With the words 'at divers times' added, it gives notice that more than one, or many offenses, may be claimed to be shown at the time and place specified. It is not unlike the common count in assumpsit for goods sold and delivered, single, but many offenses may be shown under it. The offenses, whether by a sale, furnishing or giving away, are of the same degree, whether for first or second conviction, require the same or a similar plea, the same or similar verdict, and are similarly punished. The fact that they are included in one count does not invade any constitutional or other right, more than if they were in separate counts."

"In criminal proceedings the joinder of different offenses of the same degree in an indictment does not render the proceeding defective, though it is matter of discretion in the court, on motion to quash an indictment so framed." 1 Chitty Pl. 201; The King *vs.* Kingston, 8 East 41; Young et al. *vs.* The King, 3 D. & E. 98. "The prescribed form sets forth in clear language, easily to be understood, 'the cause and nature of the accusation.' It meets fully the tenth article of the Bill of Rights in this respect. By the use of the words 'at divers times,' on the day named, it notifies him that he may be called upon to

meet more than one offense committed in one of the ways named. The prosecution is never confined to prove the offense on the day specified in the information, if the proof is within the time limited for the prosecution of the offense."

The information authorized has some comparison in a declaration for trespass upon the freehold, where under a single count one act committed prior to the date alleged and any number of acts between this date and the date of the writ can be proven.

All difficulties of defense because of the general scope of the charge are removed by specifications informing the defendant of what witnesses he is to be prepared to meet, and of what offenses he is to be prepared to defend against. In case of the charge of a single offense, this can be done by stating the date and particulars of a single transaction. In respect to the charge of more than one offense this can be done equally well by stating the date and particulars of the several transactions constituting the alleged infractions of the law. It can readily be seen that the only difference in the practical operation of the law toward respondents is that where but one offense is alleged and specifications are furnished, he has to defend but one act, but where more than one crime is charged, he has to defend as many as are charged. While this method may entail more labor upon his counsel it deprives him of no substantial rights. It is indeed an advantage, for it enables him to settle his account with the State in a single accounting, whereas if this were not the case he would be followed by a multitude of suits with the attendant costs. It has been uniformly held in Vermont, as is seen by reference to decisions quoted in the early part of the brief, that respondents are entitled to and have been furnished specifications in this class of cases from the earliest enforcement of the law. In 1886 the legislature recognized this right which the courts had accorded to respondents by enacting the act in relation thereto quoted at length heretofore. The respondent was furnished a specification of this kind which is set forth at length in the record. This informed the accused of the names of the witnesses, and should be construed according to the practice in Vermont, with the information. If it is insisted that this is permitting a bill of particulars to take the place of a substantial averment in the information, it is to be answered that it is by legislative sanction under circumstances which do not deprive the defendant of the information guaranteed by the constitution. People *vs.* Hanaw, (Michigan 1895,) N. W. Rep. 231, is strikingly in point. Defendant was charged with embezzlement, and the evidence indicated that the complainant gave to him for collection for his use and benefit, a check held by complainant upon a firm in New York. The defendant sent the check to New York, and received a draft payable to his order, and deposited this draft with a banker, receiving credit therefor. The complaint charged him with the embezzlement as "clerk, agent, servant, and collector," and with an embezzlement of a specified sum of money of the goods and chattels of complainant, and that said goods and chattels came to the possesion of defendant by virtue of his employment, etc. A bill of particulars was filed, stating the facts hereinbefore set forth with regard to the draft. The complaint was amended by inserting the words, for the

use and belonging to the said James A. Follett, (the complainant). The statute under which this proceeding was instituted, (Sec. 9176 a. 3 How. Ann. St.) is as follows: "If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any private person, or of any co-partnership, except apprentices, and other persons under age of sixteen years, or if any attorney at law, collector or other person, who, in any manner, receives or collects money, or any other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use without the consent of his employer, master or the owner of the money or goods collected or received, any money or property of another, or which is partly the property of such other and partly the property of such officer, agent, clerk, servant, attorney at law, collector or other person, which has come to his possession or under his care in any manner whatsoever, he shall be deemed to have committed larceny, and, in the prosecution for such crime, it shall be no defense that such officer, agent, servant, attorney at law, or other person, was entitled to a commission out of such money or property, as commission for collecting or receiving the same for and on behalf of the owner thereof, provided that it shall be no embezzlement on the part of such agent, clerk, servant, attorney at law, collector, or other person, to retain his reasonable collection fee on the collection, or any other valid interest he may have in such money or property."

Section 9421 of the same statutes provides, that: "In any prosecution for the offense for embezzling the money, bank notes, checks, bills of exchange, or other securities for money, of any person, by a clerk, agent or servant of such person, it shall be sufficient to allege generally in the indictment an embezzlement of money, to a certain amount, without specifying any particulars of such embezzlement, and on the trial, evidence may be given of any such embezzlement committed within six months next after the time stated in the indictment, and it shall be sufficient to maintain the charge in the indictment, and shall not be deemed a variance, if it shall be proved that any money, bank note, check, draft, bill of exchange, or other security for money, of such person, of whatever amount, was fraudulently embezzled by such clerk, agent or servant, within the said period of six months." It was insisted that the last mentioned statute was unconstitutional for the reason that the defendant was not apprised of the charge against him. But the supreme court ruled otherwise, and in the opinion said: "We think that it is within the power of the legislature to prescribe the form of indictments, keeping in view the constitutional right asserted in the case; and where, as in embezzlement, the defendant has a right to have the charge made certain by examination or bill of particulars, it cannot be said that he is not informed of the nature of the charge. If this is permitting a bill of particulars to take the place of substantial averment in the indictment, it is by legislative sanction, under circumstances which do not deprive the defendant of the information guaranteed by the constitution."

The comments of Judge Ross, in delivering the opinion of the court

in this case upon this point, are instructive. "The accused can of right call upon the prosecutor to specify more fully what is claimed to be included under these general terms. This is analogous to the common counts in assumpsit in civil cases which grew up under the common law. The defendant in a civil case is entitled to a notice of what he is called upon to meet, as much as respondents in a criminal case, and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and for this reason, that the defendant was entitled, as a matter of right, to a bill of particulars, or specifications, and that such specifications supplied what was lacking by the generality of the count, in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate. In this view the information, aided by specifications, is good by the rules of the common law." * * * "The respondent contends that the prescribed form is defective in that it does not require the names of the persons to whom sales are claimed to have been made to be set forth; that sales must be made to some person. But this contention is based on the requirements of the common law, when applicable. The specifications ordinarily would, and did in this case supply this information.

But it is insisted that the act of 1886, relating to specifications, is unconstitutional, in that it fixes the question of the sufficiency of specifications, thereby depriving the courts of the exercise of that discretion to which respondents are entitled. If it is true that this act is unconstitutional it was the privilege of the court to have disregarded it. The court was not bound in its discretion to say that the prosecuting officer had alleged the offenses in the specification with all the certainty as to time and person that he was able, because he so alleged in the specifications. It was within the province of the court to have directed a more minute statement as to the crimes intended to be proved, and it was not in the nature of things impossible to have furnished it. The statement was such as satisfied the respondent, for he took no exception to it.

The language of this court in Rosen *vs.* United States, *supra*, is suggestive. "And if he wished to be informed, before entering upon trial, what particular parts of the paper would be relied upon as bringing the case within the statute, he could, as already suggested, have applied for a bill of particulars, which the court, in the exercise of sound legal discretion, might have granted or refused as the ends of justice required."

It was too late to raise the question of the sufficiency of the specifications in a motion in arrest of judgement. This being so, this court has no jurisdiction of this question. To give this court jurisdiction to review a State judgment the title, right, privilege or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it. Duncan *vs.* Missouri, 152 U. S. 377.

If the count is bad for duplicity, it is cured by verdict. "If the defendant did not object before, it has been demonstrated that the duplicity did him no harm; and by being silent when, if ever, he must

have felt the hurt, he has waived all right to complain." Bishop's Crim. Pro. s. 443, 3. This point cannot be raised by motion in arrest. Connors *vs.* United States, 158 U. S. 408.

The respondent's counsel further insists that the legislature by enacting that this class of cases shall stand for trial at the first term, that a continuance shall not be allowed without cause shown, that a *nolle prosequi* shall not be entered without cause, and only with the consent of the court, has invaded the province of the court so that the defendant does not have a common law jury trial, and for that reason the whole law is unconstitutional. This brings us to the consideration of the question as to whether the defendant was accorded the "equal protection of the laws." "This class of cases is not exceptional in their manner of trial. They are proceeded with like all other cases. The selection and empaneling of the jury, the rules of evidence, burden of proof, and procedure in the trial, is the same as in all other criminal cases. * * * He was notified, in clear and unmistakable language, of the offense with which he was charged; he heard the evidence by which it was sought to be established; he was given ample opportunity to meet it by counter evidence; and was given an impartial jury to determine whether the charges were established beyond a reasonable doubt." Chief Judge Ross in the case at bar.

If the statute in question affects all persons in Vermont engaged in the traffic in liquors in the same manner, it is not open to the objection that it denies to any one the equal protection of the laws. Giozza *vs.* Tiernan, 148 U. S. 659, is decisive of this point. Here this court said: "This statute effects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree. Whether considered as imposing restrictions upon the sale in the exercise of the police power of the State, or as levying taxes upon occupations under the authority of the legislature in that behalf, petitioner was not arbitrarily deprived of his property nor denied the equal protection of the law. Repeated decisions of this court have determined that such legislation is not in violation of the constitution." Crowley *vs.* Christensen, 137 U. S. 86; Eilenbecker *vs.* Plymouth County, 134 U. S. 31; Kidd *vs.* Pearson, 128 U. S. 1; Mugler *vs.* Kansas, 123 U. S. 623; Foster *vs.* Kansas, 112 U. S. 201; Bells Gap R. Co. *vs.* Penn. 134 U. S. 232; Home Ins. Co. *vs.* New York, 134 U. S. 594; Pacific Exp. Co. *vs.* Leibert, 142 U. S. 339; Walston *vs.* Nevin, 128 U. S. 678; Wurts *vs.* Hoagland, 114 U. S. 606; In re Converse, 137 U. S. 624; Barbier *vs.* Connelly, 113 U. S. 27; Hing *vs.* Crowley, 113 U. S. 703.

The laws in question in this controversy do not abridge the privileges and immunities of the accused as a citizen of the United States. None of the fundamental rights belonging to him as a citizen of the United States have been denied him. It is sufficient that he has been accorded all the rights which are secured in Vermont to all who are similarly situated. It has happened that in the administration of the liquor law certain procedure has been provided, differing in some respects from procedure in other classes of crimes. It is sufficient for the purposes of this case that our constitution and laws authorize this system of administration of this law. It is for the State to determine

what shall be the privileges and immunities to be enjoyed by citizens of the United States under its constitution and laws, as well as to prescribe what shall be due process of law in cases like this. The United States Constitution does not make the privileges and immunities enjoyed by the citizens of one State under the constitution and laws of that State, the measure of the privileges and immunities to be enjoyed as of right, by a citizen of another State under its constitution and laws. McKane *vs.* Durston, 153 U. S. 685. "The 14th Amendment," as was said by Mr. Justice Bradley in Missouri *vs.* Lewis, 101 U. S. 22, "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

The statutes in question are a part of the police regulations of Vermont, and as such, are not affected by the 14th Amendment to the Constitution of the United States. These powers were reserved to the States at the time of the adoption of the National Constitution, and this amendment was not designed to interfere with the province of the State in the exercise of them. In Giozza *vs* Tiernan, 148 U. S. 659, this court, by Mr. Chief Justice Fuller, said: "The amendment does not take from the States those powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education and good order." This court in Leeper *vs.* Texas, 139 U. S. 462, said: "That by the Fourteenth Amendment the powers of States in dealing with crimes within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law." In Ex parte Converse, 137 U. S. 624, Mr. Chief Justice Fuller, speaking for the court, said: "We repeat, as has been so often said before, that the 14th Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State." In Re Kemmler, 136 U. S. 436, it was held, that "the 14th Amendment did not radically change the whole theory of the relation of the States and the Federal government to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests, primarily, with the States, and the amendment furnishes an additional guaranty against any encroachment by the States

upon those fundamental rights which belong to citizenship and which the State governments were created to secure. The privileges and immunities of the citizens of the United States, as distinguished from the privileges and immunities of the citizens of the States, are indeed protected by it; but these are privileges and immunities arising out of the nature and essential character of the national government, and granted and secured by the Constitution of the United States." * * * "Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties, and property of its citizens, and to promote their health, peace, morals, education and good order." In Barbier *vs.* Connelly, 113 U. S. 27, this court said: "The 14th Amendment in declaring that 'no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection should be given to all under like circumstances in the enjoyment of their personal and civil rights, that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts, that no impediment should be imposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." See U. S. *vs.* Cruikshank, 92 U. S. 542; Slaughter House Cases, 83 U. S., 16 Wall. 36; Arrowsmith *vs.* Harmoning, 118 U. S. 194; Baldwin *vs.* Kansas, 127 U. S. 52.

That the regulation of the liquor traffic is a proper matter of State control has been repeatedly decided by this court. In Crowley *vs.* Christensen, 137 U. S. 86, Mr. Justice Field said: "By the general concurrence of the opinion of every civilized christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attribu-

table to the use of ardent spirits obtained at these retail saloons than to any other source. * * * * It is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business, to mitigate its evils or to suppress it entirely." Mr. Justice Brown said, in rendering the opinion in Louisville & N. R. Co. *vs.* Commonwealth of Kentucky, 161 U. S. 677, that: "Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exercise of such power the legislature is vested with a large discretion, which if exercised *bona fide* for the protection of the public is beyond the reach of judicial inquiry."

But it is insisted that the law complained subjects the offender to very great hardship, makes the crime of which he is charged, by reason of the imprisonment that may follow a conviction, infamous, permits the courts of an inferior jurisdiction even to strip him of his property and imprison him for a long period of time. But this makes the regulations none the less police regulations under the general scope and meaning of the term. "They are but the ordinary police regulations such as the State may make in respect to all classes of trade and employment." Cooley's Const. Limitations, s. 726; Bode *vs.* State, 7 Gill. 326; Bancroft *vs.* Dumas, 21 Vt. 456; Thomason *vs.* State, 15 Ind. 449; License Cases, 5 How. 504; Metropolitan Board of Excise *vs.* Barrie, 34 N. Y. 657; Goddard *vs.* Jacksonville, 15 Ill. 59; Kattlering *vs.* Jacksonville, 50 Ill. 39; State *vs.* Allmond, 2 Houst, 612. If the "way of the offender is hard" under this law, this does not make it unconstitutional, or the less a police regulation. Says, Mr. Justice Field in Missouri Pac. R. Co. *vs.* Humes, 115 U. S. 512, "It is hardly necessary to say that the hardship, in policy, or injustice of State laws, is not necessarily an objection to their validity; the remedy for evils of that character is to be sought from State legislatures." That the process is somewhat summary and the method unusual does not render the law the less a police regulation. If all the hardship of which counsel for respondent complain had been visited upon his head, instead of the limited sentence imposed, this would have been little worse in the general result than what is obtained before police justices in our large cities, where by the consideration of such courts certain unrepenting transgressors are kept for the greater portion of their lives at hard labor upon sentences imposed without the intervention of a jury to determine the facts of the cases. And yet this practice is proper as a police regulation. Says Mr. Justice Brown, in this connection in Lawton *vs.* Steel, 152 U. S. 142: "There is not a State in the union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the constitution, though technically in this way a person may be deprived of his liberty without the intervention of a jury."

This court has no authority to declare the statutes in question void

on account of their collision with the State constitution, and the construction of the State statutes by State courts is conclusive and binding upon this court. It was held in Leeper *vs.* Texas, 139 U. S. 462, "That whether statutes of a legislature of a State have been duly enacted in accordance with the requirements of the constitution of such State is not a Federal question, and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States." South Ottawa *vs.* Perkins, 94 U. S. 260; Post *vs.* Kendall Co. Suprs. 105 U. S. 667; Norton *vs.* Shelby County, 118 U. S. 425; Atlantic & G. R. Co. *vs.* Georgia, 98 U. S. 359; Baldwin *vs.* Kansas, 129 U. S. 52. It was held by Mr. Chief Justice Fuller in Ex parte Converse, 137 U. S. 624: "It is not our province to inquire whether the conclusion reached and announced by the Supreme Court (of Michigan) was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the State Constitution and laws." It was further held in this case that "the State cannot be deemed guilty of violating its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction." Mr. Chief Justice Waite, in Walker *vs.* Sauvinet, 92 U. S. 90, declared, "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." In the case of Leffingwell *vs.* Warren, 67 U. S., 2 Black 509, it was decided that: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." The meaning of a State statute, declared by the highest court of the State, is conclusive upon this court. Randall *vs.* Brigham, 74 U. S., 7 Wall. 523. "The law in question was held to be within the legislative power, and so far as the State Constitution is concerned, that conclusion is not re-examinable here." Giozza *vs.* Tiernan, 148 U. S. 659. The Supreme Court has no authority, on a writ of error from a State court to declare a State law void on account of its collision with a State Constitution. Jackson *vs.* Lamphire, 3 Pet. 280. The ruling of a State court that a State law does not violate the State Constitution, is conclusive upon this court. Gut *vs* Minn., 76 U. S. 35. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications. Leffingwell *vs.* Warren, *supra*. United States *vs.* Morrison, 4 Pet. 124; Green *vs.* Neal, 6 Pet. 291.

## IV.

If the State court did consider and decide any Federal question wrongly as against the respondent, it also put the case upon a ground involving no Federal question, broad enough to sustain the decision reached; and therefore the United States Supreme Court has no jurisdiction. The defendant's objections rest upon the motion to quash, and a motion in arrest of judgment. The former motion was made in the trial court, and it stated that the state's attorney "had no legal authority to make and file such information in said cause." This was overruled, and defendant excepted. The opinion in the case sufficiently disposes of the objection. "The motion to quash was properly denied. Whether strictly addressed to the discretion of the trial court and not revisible in this court, or otherwise, the ground of the motion was that the State's Attorney had not authority to proceed by the information. That ground is not insisted upon now. While held to be addressed to the discretion of the trial, and not revisible in this court, because it cannot be pleaded as a matter of right, in State *vs.* Stewart, 59 Vt. 273; in State *vs.* Keyes, 8 Vt. 57; State *vs.* Davis, 52 Vt. 376; and State *vs.* Meader, 62 Vt. 458, in which, whether the entertainment of such motions is discretionary with the trial court, was not raised or considered, the denial of such motions by the trial court was considered and passed upon in this court. In the case last named, the judgment of the trial court, on such a motion, was reversed and the complaint was adjudged insufficient and quashed. But if the question presented by such motion can be entertained in this court, it can be entertained only upon the ground raised by the motion, and passed upon by the trial court. Error in the action of the trial court must distinctly appear. The party cannot be allowed to urge one ground for sustaining the motion in that court and then, in this court, set up a new ground for sustaining it, a ground not considered nor passed upon by the trial court. The respondent's counsel contends that by using in the motion the words, "such information," he thereby raised the question of the sufficiency of the information. But this is not the ordinary and natural construction to be placed upon the language of the motion. If he really intended to raise the question of the insufficiency of the information, we should have expected he would have pointed out wherein he claimed it was insufficient. He should have done so to have raised that question. It is not for the trial court to hunt for some concealed rather than clearly defined ground for entertaining the motion. For this court to revise the action of the trial court on such motion, as we think it might, if it was shown that the trial court entertained it, and passed upon its sufficiency as a matter of law, the grounds for the motion, as well as the action of the trial court, should be clearly and fully set forth. Otherwise this court will assume that the trial court denied the motion as a matter of discretion."

When the case came to the Supreme Court upon the exception to the refusal of the court to grant the motion to quash, the defendant filed in the Supreme Court his motion in arrest of judgment. This was out of order in that court, sections 1699 and 1700 of the Revised Laws pro-

viding that such motions be made in the county court and passed to the Supreme court, and the court heard the motion not as a matter of right but as a matter of favor.

Such motions are limited in their operation. After verdict every reasonable intendment is made in support of the verdict, if there is nothing on the record to prevent it. Chitty lays down the rule thus: "The general principle upon which it depends appears to be that where there is any defect, imperfection or omission, in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of facts so defectly or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict. The court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleading was proved at the trial, and such an intendment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given." This view of the principle has been frequently affirmed by the Supreme Court of Vermont. In Needham *vs.* McAuley, 13 Vt. 65, the court by Collamer, J., said: "The law is that after verdict, everything will be intended or be presumed to have been proved which is implied or must have appeared in proving what is actually alleged." In State *vs.* Freeman, 63 Vt. 496, it was held that a complaint charging that the accused "did profanely curse," was sufficient after motion in arrest. See also Morey *vs.* Homan, 10 Vt. 564; Manwell *vs.* Manwell, 14 Vt. 14; Closson *vs.* Staples, 42 Vt. 207; Noyes, French & Fickett *vs.* Parker, 64 Vt. 379, where this principle is further discussed and recognized. Apply the rule of the common law set forth above, which is likewise the law of Vermont, to the case at bar, and it removes all the essential objections of the defendant to the form of the indictment. This strips the question of all Federal issues and bases the judgment upon a ground broad enough to sustain the decision without involving any Federal question. This court then has no jurisdiction. It is a well established and well understood rule of this court that where the Supreme Court of the State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. State of Conn. *vs.* Woodruff, 153 U. S. 689; Hammond *vs.* Johnston, 142 U. S. 73; Hopkins *vs.* McLure, 133 U. S. 380; Hall *vs.* Akers, 132 U. S. 554; Henderson Bridge Co. *vs.* The City of Henkerson, 141 U. S. 679; New Orleans *vs.* New Orleans Water Works Co., 142 U. S. 79; Murdock *vs.* City of Memphis, 20 Wall. 591; Missouri P. R. Co. *vs.* Fitzgerald, 160 U. S. 556; Chemical Natl. Bank *vs.* City Bank, 160 U. S. 646; Dibble *vs.* Bellingham, U. S. S. C., 16 S. C. Rep. 936. "He did not take the point, either before the justice of the peace or the county court, that there was any defect or

want of fullness in the complaint. Any such point was waived by a failure to take it. *Besides it did not involve any Federal question.* The question of the consolidation of several offenses in one complaint is purely a matter of State practice, and it is a familiar rule of criminal law that time need not be proved as alleged." Mr. Justice Blatchford in O'Neil *vs.* Vermont, 144 U. S. 323, and cases therein cited. It has been also held by this court, "That to give this court jurisdiction to revise the judgment of a State court under section 709 of the Revised Statutes, because of the denial of the State court of any right, title, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the *proper time* and in the *proper way*." Leeper *vs.* Texas, 139 U. S. 462; Spies *vs.* Ill. 123 U. S. 131; Baldwin *vs.* Kansas, 129 U. S. 52; Chappell *vs.* Bradshaw, 128 U. S. 132.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground (a constitutional one) unless the repugnancy to the constitution be clear, and the conclusion that it exists, inevitable. Every doubt is to be resolved in support of the enactment." Pine Grove Township *vs.* Talcott, 86 U. S. 666.

It is well to bear in mind that: "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry, whether the legislature has transcended the limits of its authority." Mr. Justice Harlan in Mugler *vs.* Kansas, *supra.*

The warning of Sir Mathew Hale, expressed in 2 P. C. 193, applies as well to misdemeanors as to the highest crimes: "In favor of life, too great strictness has been in all times required in point of indictments: and the truth is, that it has grown to a blemish and inconvenience in the law and the administration thereof. More offenders escape by the over easy ear given to exceptions in indictments than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonor of God; and it were very fit, that by some laws, this overgrown curiosity were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy."

Frank L. Fish

C. A. Prouty.

# HODGSON *v.* VERMONT.

## ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 26. Argued October 14, 15, 1897. — Decided November 29, 1897.

The State's attorney of Vermont, under the statutes of that State, filed an information in the proper court against H., charging that on a day and at a place named he "did, at divers times, sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." At the same time he filed specifications as follows: "In said case the State's attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say," giving the names without the residences. "And the undersigned State's attorney states that he has also specified the offences against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause; and the State's attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute. And the State's attorney further specifies and relies upon the selling, furnishing and giving away of intoxicating liquor by the respondent within three years before the filing of said information, to some person or persons now unknown to the State's attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and discretion of the court may admit." This specification is not required by any statute, and forms no part of the information. It is, however, provided by statute that "when a specification is required, it shall be sufficient to specify the offences with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and when the specification sets forth the sale,

Statement of the Case.

furnishing or giving away to any person or persons unknown, the witnesses produced may be inquired of as to such transactions with any person, whether named in the specification, or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification, upon such terms as to a postponement of the trial, for this cause, as the court shall think reasonable." It did not appear from the record that the specification was asked for by the respondent, nor whether the offences of which he was convicted were for selling, furnishing or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. *Held*, that this was due process of law, within the meaning of the Fourteenth Amendment to the Constitution.

The words "due process of law" do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The Amendment undoubtedly forbids arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State.

At the June term, 1892, of the county court for the county of Addison, in the State of Vermont, the plaintiff in error was tried and convicted "of one first offence and one second offence," upon an information for selling liquor, filed by the State's attorney. The information was as follows:

"Be it remembered that Frank L. Fish, State's attorney within and for said county, comes here into open court in his own proper person, and upon his oath of office gives said court to understand and be informed, that Edward Hodgson of Orwell, in the county of Addison, and State of Vermont, on the 7th day of June, A.D. 1892, at Orwell, in the county of Addison aforesaid, did, at divers times, sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the said State's attorney, on his oath aforesaid, comes and gives said court further to understand and be informed, that the said Edward Hodgson, prior to this time, to wit, at the December term of the county court held at Middlebury, in and for the county of Addison, on the first Tuesday of

December, A.D. 1891, before and by consideration of said court, was, as appears of record, convicted of selling, furnishing and giving away intoxicating liquors, against the law in such case made and provided."

It is stated in the record that the State's attorney "likewise filed specifications in words and figures following:"

"In said case the State's attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say:

[Here follow the names of sixty-six persons, whose residence is not given.]

"And the undersigned State's attorney states that he has also specified the offences against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause; and the State's attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute.

"And the State's attorney further specifies and relies upon the selling, furnishing and giving away of intoxicating liquor by the respondent within three years before the filing of said information, to some person or persons now unknown to the State's attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and discretion of the court may admit."

This specification is not required by any statute, and forms no part of the information. It is, however, provided by statute that "*when* a specification shall be *required*, it shall be sufficient to specify the offences with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and when the specification sets forth the sale, furnishing or giving away to any person or persons unknown, the witnesses produced may be inquired of as to such transactions with any person,

whether named in the specification or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification, upon such terms as to a postponement of the trial, for this cause, as the court shall think reasonable." Statute of Vermont, 1886, No. 37.

It does not appear from the record that the specification was asked for by the respondent, nor whether the offences of which he was convicted were for selling, furnishing or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. These proceedings were based upon c. 169, §§ 3802, 3803, 3859, 3860 of the Revised Laws of Vermont, (Revision of 1880,) as amended by No. 42 of the statutes of 1888, which are as follows:

"SEC. 3802. If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps or possesses with intent to sell, furnish or give away, intoxicating liquor or cider, in violation of law, he shall forfeit for each offence to the State, upon the first conviction not less than five nor more than one hundred dollars, and may also be imprisoned in the discretion of the court not more than thirty days; upon the second and each subsequent conviction, not less than ten nor more than two hundred dollars for each offence, and shall also be imprisoned not less than one month nor more than one year.

"SEC. 3803. Justices shall have concurrent jurisdiction with the county court in prosecutions under the preceding section, and the same may be tried upon the complaint of the grand juror of the town, or of the State's attorney, before a justice, or upon the information of the State's attorney, before the county court.

"SEC. 3859. Complaints for any offence against section 3572 (section 3802) shall be substantially in the following form:

"'STATE OF VERMONT, } ss:
——— COUNTY, }

"'To A. B., justice of the peace for the county of ———, comes C. D., grand juror of the town of ———, in said county,

and complains that E. F., of ———, on the ——— day of ———, A.D. ———, at ———, did, at divers times, sell, furnish or give away (as the case may be) intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"'C. D., *Grand Juror.*'

"SEC. 3860. Under the foregoing complaint every distinct act of selling, furnishing or giving away may be proved, and the court shall impose a fine for each offence."

Before trial the plaintiff in error filed a motion to quash the indictment. This motion was overruled by the court, to which decision the plaintiff in error duly excepted. The case was carried by the plaintiff in error to the Supreme Court of Vermont upon exceptions to the overruling by the county court of his motion to quash, and upon other exceptions taken at the trial, and not material here, as they raise no Federal question. Judgment and sentence were stayed in the county court, to await the result of the hearing in the Supreme Court.

In that court the plaintiff in error filed a motion in arrest of judgment, which he was allowed by the court to do, and the same was taken into consideration and passed upon by the court.

The grounds set forth are in substance: That the information upon which the conviction was had is insufficient and void, and lacking in substance in various particulars specified in the motion; that the respondent was deprived of his right to be informed of the nature and cause of the accusation against him; that he was convicted of two infamous crimes without due process of law, and denied by the State the equal protection of the law; that the statutes of Vermont under which the proceedings were had are in conflict with the provisions of the Constitution of the United States, and especially that provision of the Fourteenth Amendment which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or prop-

erty without due process of law; nor deny to any person the equal protection of the law."

The Supreme Court of Vermont affirmed the judgment of the county court refusing to quash the information, and overruled the motion in arrest, and proceeded to render judgment upon the verdict, and sentenced the plaintiff in error to pay a fine of $30 for the first offence and $70 for the second offence, with costs taxed at $197.36, and to be confined at hard labor in the house of correction at Rutland for the period of sixty days, "with alternative sentence." The alternative sentence is, that in case of failure to pay the fine and costs within twenty-four hours, the respondent be confined in the house of correction for the term of three days for each dollar, in addition to the period for which he is sentenced. Rev. Laws, § 4336.

The court decided, in substance, that the information was sufficient; that it constituted due process of law; that the statute did not infringe the requirements of the Constitution of the United States by depriving the accused of the equal protection of the laws or by subjecting him to cruel and unusual punishment.

The defendant thereupon sued out a writ of error to this court, which was allowed by the Chief Judge of the Supreme Court of the State of Vermont.

*Mr. E. J. Phelps* for plaintiff in error. *Mr. W. H. Bliss* was on his brief.

*Mr. Frank L. Fish* and *Mr. Charles A. Prouty* for defendant in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

At a former term of this court, in the case of *O'Neil* v. *Vermont*, 144 U. S. 323, we were asked to hold certain provisions of the laws of the State of Vermont, concerning the importation and sale of intoxicating liquors, void, because they

conflicted with the Constitution of the United States wherein it confers upon Congress exclusive power to regulate interstate commerce and forbids cruel and unusual punishments. But the court was of opinion that the record in that case did not disclose that any Federal question had been raised or decided in the Supreme Court of Vermont, and the writ of error was accordingly dismissed.

In the present case the assignments of error raised no question as to the character of the punishment inflicted upon the accused. Nor do the facts of the present case call upon us to consider the validity of those portions of the Vermont statutes which concern intoxicating liquors as articles of interstate commerce.

But certain Federal questions are sufficiently presented in this record, which have been argued with great ability, and which it is our duty to now consider.

The first contention is that the information under which the plaintiff in error was tried and convicted was defective in such essential particulars as to deprive him of his liberty and property without "due process of law." It is said that the information does not charge any specific offence; that it does not state with any reasonable certainty the time when the offences charged, or any or either of them, occurred; that the name of no person to whom liquor was alleged to have been sold, furnished or given away is stated; that neither the place where the sales are claimed to have taken place, the kind or quantity of intoxicating liquor so disposed of, nor any other circumstance that would tend to identify the transactions referred to, is stated; that such an information does not protect the accused the least against being prosecuted for one crime and convicted of another; that under this information it is and must remain utterly uncertain what particular one of many offences the accused was convicted of; that the record of an acquittal or conviction upon such an information forms no bar to a second prosecution for the same offence.

While we are not relieved from considering these objections by the mere fact that the offences charged arose under a statute, and were proceeded in, in a court of a State, it is

yet obvious that our concern in them can go no further than to inquire whether the plaintiff in error was deprived of the rights and immunities secured to him by the Federal Constitution.

Several of the objections specified merely raise questions of form, and, as such, were conclusively ruled by the state court. But it is insisted that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offence, so that he may appear in court prepared to meet every feature of the accusation against him.

Conceding that this is a correct statement of the rights of an accused person, and that, if deprived of such rights, he may properly invoke the protection of the Constitution of the United States, our reading of this record has not satisfied us that the plaintiff in error has any just grounds of complaint. We adopt, in this regard, the views and language of the Supreme Court of the State:

"The offence created by the statute is the provision of intoxicating liquors without the authority of law, either by sale, furnishing or giving away. There are no circumstances necessary to be set out to constitute either of these facts an offence. The terms of the statute as clearly import the prohibited offence as any terms can. The offence is neither heightened nor lessened by, nor dependent upon, the kind or amount of intoxicating liquors sold, nor upon the person to whom the sale, furnishing or giving away is made, nor upon the amount of money received, nor upon whether made by the respondent or by some one for him. None of these particulars need be set forth to notify the respondent of the offence with which he is charged, and called upon to answer, nor to apprise the jury of what they are to convict or acquit him, nor to apprise the court of the sentence which it should impose. The prescribed form covers the offence in the exact and easily understood language of the statute which creates

it. This is sufficient. . . . It is not an ancient crime which has been, from time immemorial, clothed in special terms which, by long use, have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common law crime without defining it, or creates an offence and prescribes no form for an information. In such cases it is well held that the common law requirements in charging it must be met. . . . But it is sufficient to charge a statutory offence in the terms of the statute. . . . The respondent contends that the prescribed form is defective, in that it does not require the names of the persons to whom sales are claimed to have been made to be set forth; that sales must be made to some person. But this contention is based on the requirements of the common law, when applicable. The specifications ordinarily would, and did in this case, supply the information. . . . It is also contended that the particulars of the kind of liquor, price, and name of the person to whom sold should be set forth in the information, both to apprise the respondent of the evidence he has to meet, and to have the record protect him from a second information for the same offence. It is never necessary for the State to disclose what is merely its proof of the commission of the offence charged in the information. If the record does not itself identify the offence or offences for which conviction has been had, on the trial of a subsequent prosecution, such identification may be made by parol testimony. If these particulars were set out in the information, resort might have to be had to parol proof to identify the offence for which conviction was had. It might occur that the same respondent made more than one sale of the same kind and quantity of liquor, to the same person, at the same price, at the same place and on the same day. Besides by the common law it has always been held that the prosecutor need not set forth the name of the person, when unknown. It is sufficient to state that his name is unknown. . . . These particulars of the kind, quantity, price, and person to whom sold, are seldom known to the prosecutor until revealed by the witness upon the stand. Without these

particulars the prescribed form answers every essential requirement of the common law in regard to informations or indictments. The prescribed form sets forth in clear language, easily to be understood, 'the cause and nature of the accusation.' . . . By the use of the words 'at divers times' on the day named, it notifies him that he may be called upon to meet more than one offence committed in one of the ways named. The prosecution is never confined to prove the offence on the day specified in the information, if the proof is within the time limited for the prosecution of the offence. The accused can of right call upon the prosecutor to specify more fully what is claimed to be included under these general terms. This is analogous to the common counts in assumpsit in civil cases, which grew up under the common law. The defendant in a civil case is entitled to notice of what he is called upon to meet, as much as a respondent in a criminal case, and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and for this reason, that the defendant was entitled, as a matter of right, to a bill of particulars, or specifications, and that such specifications supplied what was lacking by the generality of the count, in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate. In this view, the information, aided by specifications, is good by the rules of the common law; but, whether it be or not, the legislature has an undoubted right to change and mould the forms of procedure so long as it does not deprive the accused of any constitutional right. . . . This class of cases is not exceptional in their manner of trial. They are proceeded with like all other cases. The selection and empanelling of the jury, the rules of evidence, burden of proof, and procedure in the trial, is the same as in all other criminal cases. What has been said in regard to the scope of the information, aided by specifications, to which the respondent was entitled as a matter of right, and which were furnished to him, and in regard to the order and manner of his trial, makes the respondent's trial a trial by 'due process

of law,' or in accordance with 'the law of the land,' within the varying definitions of those general terms as claimed by the respondent's counsel." *State* v. *Hodgson*, 66 Vermont, 134, 150.

It is argued that the defects or insufficiencies of the information cannot be supplied by the specification, because the latter is not required by any statute and is not a matter of right. If this assumption was well founded it would strengthen the criticism urged against the information. But that such assumption is not well founded is shown by the opinion of the Supreme Court of Vermont above quoted, wherein it is held that the accused under these proceedings is entitled to a specification as a matter of right.

The defendant being entitled to a specification as a matter of right, under the decision of the Supreme Court of the State, the question of the validity of the information in the absence of any specification is not presented by this case, and we therefore express no opinion upon it.

It is further claimed that the conviction of the plaintiff and his sentence to infamous punishment was without due process of law, because he was not indicted by a grand jury. Discussion of this contention is unnecessary, because it was the very matter considered in *Hurtado* v. *California*, 110 U. S. 516, where it was ruled that the words "due process of law" in the Fourteenth Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The views expressed in that case have been approved and followed in a number of subsequent cases, of which a few may be cited. *Barbier* v. *Connolly*, 113 U. S. 27; *In re Kemmler*, 136 U. S. 436; *Ex parte Converse*, 137 U. S. 624; *Hallinger* v. *Davis*, 146 U. S. 314.

We concede the proposition, so earnestly urged on behalf of the plaintiff in error, that by the Fourteenth Amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a State, it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal

protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute. But we are contented to close this discussion by quoting the language of this court in *Ex parte Converse*, 137 U. S. 624: "We repeat, as so often has been said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State."

Finding no error therein, the judgment of the Supreme Court of Vermont is

*Affirmed.*